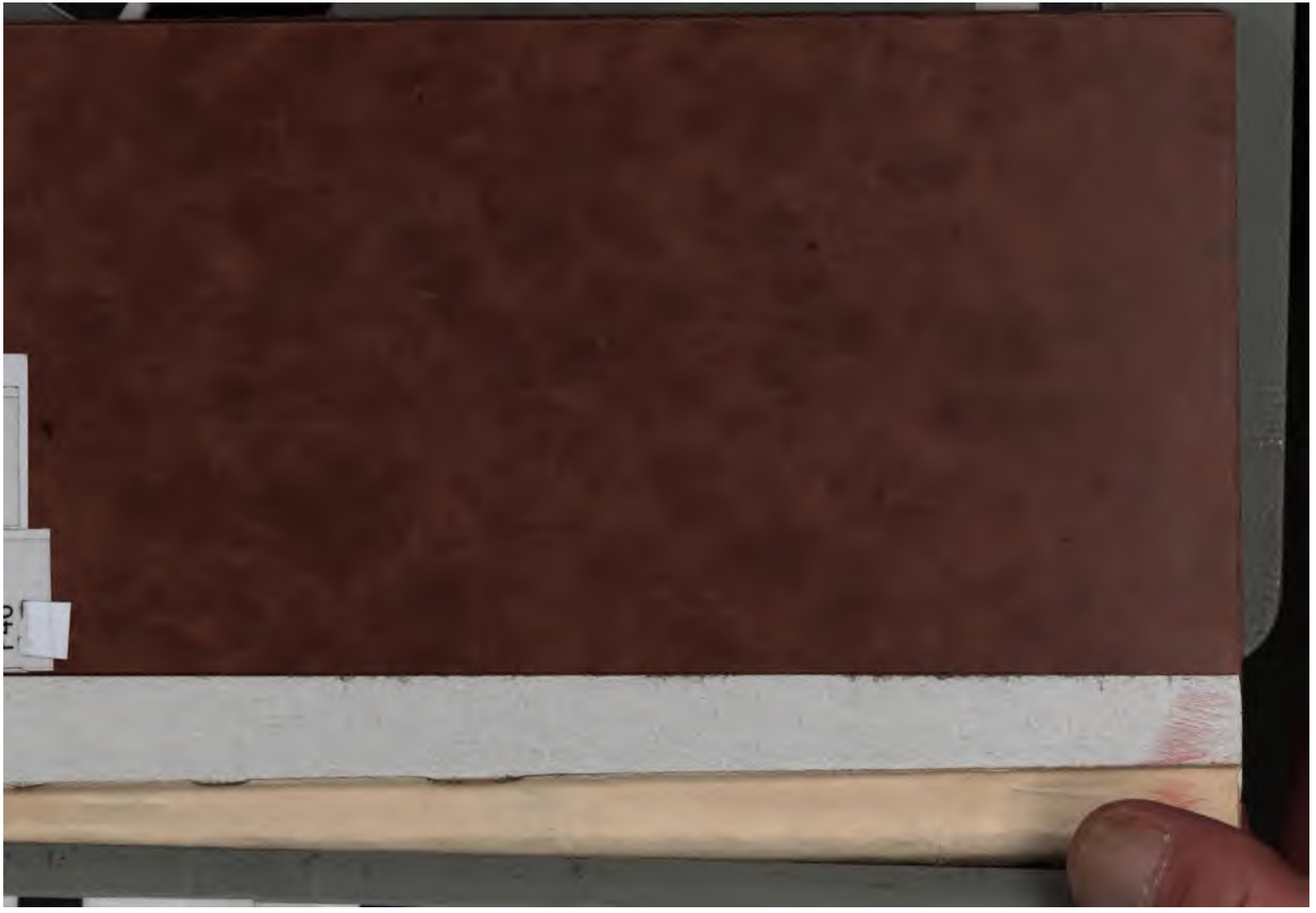

THE

PRACTICE AND COURTS

OF

Civil and Ecclesiastical Law,

AND THE STATEMENTS IN

MR. BOUVERIE'S SPEECH

ON THE SUBJECT,

EXAMINED;

WITH

OBSERVATIONS ON THE VALUE OF THE STUDY OF CIVIL AND INTERNATIONAL LAW IN THIS COUNTRY;

IN

A LETTER

TO

THE RIGHT HON. W. E. GLADSTONE,

MEMBER OF PARLIAMENT FOR THE UNIVERSITY OF OXFORD.

BY

ROBERT PHILLIMORE,

ADVOCATE IN DOCTORS' COMMONS, AND BARRISTER OF THE MIDDLE TEMPLE.

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My dear Gladstone,

There would be no impropriety, I think, in addressing the following remarks to any member of parliament, who may, and probably will be, called upon hereafter to legislate upon the important and complicated subject to which they refer. But it appears to me that there is an especial propriety in invoking your particular attention to them—not upon the personal ground of the friendship which has subsisted between us for so many years, though there is no reason why this motive should be without its influence upon me, but because you have filled very high offices and taken a very conspicuous part in the government of the country, because you were a distinguished member of that administration which propounded and carried through one branch of the legislature (the most judicial branch, I may be permitted to say) a measure of wise, vigorous, well-considered

and practicable reform upon this subject; and also because you are the Representative in Parliament of one of the Universities, and, as such, necessarily interested in whatever affects their privileges, and in whatever concerns the study of, what is usually called, the Civil Law.

Your very sincere Friend,

ROBERT PHILLIMORE.

CONTENTS.

SECOND PART.

APPENDIX.

PRELIMINARY REMARKS.

THE speech recently delivered by Mr. Bouverie in the House of Commons may be fairly presumed to contain the severest bill of indictment which the utmost pains and information could instruct, and the fiercest zeal could prefer, against the Courts of Civil and Ecclesiastical Jurisprudence. It swallows up and embodies all the petitions of persons not permitted to practise in these Courts, of Quakers objecting to pay tithes, Dissenters to pay rates, Clergymen to submit to canonical discipline, and of individual suitors in all Courts, whether testamentary, matrimonial, or maritime, who have been so unfortunate (through, I need not say, the ignorance or corruption of their judges) as to be cast in their suits; all the petitions on these matters which may from time to time have been laid upon the table of parliament, from the first precedent about the time of the abolition of the Episcopate and the breaking out of the Civil War in these realms down to the present day.*

The speech is made by a gentleman who is a member of the common law bar, and therefore,

* I have now before me a scurrilous pamphlet, evidently written by the Puritans, entitled the "Last Will and Testament of Doctors' Commons," &c. and of which "all the Scottish Covenanters" are appointed Executors. "Printed in the Yeare, of Doctors Commons Feare, 1641."

it must be presumed, particularly cautious, not merely from the ordinary motives of courtesy, but for the sake of professional reputation for accuracy, in advancing unfounded charges, or dressing up a partial statement, making a case, as it is called, against another branch of the bar.

The speech is made not hastily, but after no inconsiderable gestation, for it was announced some months, I think, before the honourable member was actually delivered of it. It appears to have received the applause of the House, to have elicited an opinion correspondent with that of the speaker from the Government, and to have remained unanswered. It must be observed, on the other hand, that there was no civilian then present in the House, that no legal member supported Mr. Bouverie's view, and that the speech concluded by an abstract proposition, which was afterwards withdrawn.

Now, the averments upon which the motion of Mr. Bouverie was to have been founded, were certainly such as would have justified the terms of vehement censure in which it was couched. It is obvious that I cannot expect to gain a hearing for that part of the case which is the most interesting to statesmen, namely, the advantage of a profession conversant with Civil and International Law, unless I can remove the serious practical objections which are alleged *in limine*, and which must disincline such persons to enter at all upon the theoretical view of the subject.

FIRST PART.

Inquiry into the Correctness of the Charges contained in Mr. Bouverie's Speech.

These averments were, in substance and effect, —that the Courts of Civil and Ecclesiastical Law possessed a jurisdiction grounded on fraud, fed by extortionate expenses, exercised in the most tyrannical manner over the consciences, properties and liberties of men by corrupt, or at least suspected and incapable judges, who compelled other Courts to execute sentences which were incorrect in law and oppressive in fact;—and that this system, though repeatedly condemned by the judges of Westminster Hall and the Commissioners of the Crown, was still permitted to torture and grind the unoffending subjects of this unhappy country.

If these averments be true, if they be facts, I can only marvel at the moderation of the speaker, I can only wonder that any Government should allow themselves four and twenty hours' delay in proposing, as a measure certain to be voted by acclamation, the demolition of such a monstrous edifice of corruption, iniquity and violence; talk of Star Chambers and High Commissions under the Tudors and Stuarts, or Forest Laws under the Plantagenets, they were the personification of justice, tempered by equity, compared with these piratical tribunals, whose ends are plunder and oppression, and whose means are tyranny and fraud.

It might indeed have occurred to the legal members of the Government, that many illustrious names, both in the history of the State and of Jurisprudence, had been strangely enough connected with the administration of injustice in these wicked courts, but the *facts* stated by the learned member would have dispelled these prejudices, and the axe would have been laid forthwith to the root of this legal Upas.

At all events, I for one declare that it is scandalous that such should not have been the result, if the criminating statement was correct. But then I claim to have the case tried upon this issue; and if it shall appear on investigation that these charges, thus diligently prepared and deliberately preferred, are (such is the judicial blindness of partizanship) in all material respects entirely without foundation,—that the cases cited are either complete, though, I need not say, unintentional misrepresentations, or that qualifying facts, giving a wholly different colour and complexion to them, have been, though only from haste and ignorance, omitted; that unfavourable evidence of eminent persons has been torn from its context, prominently put forward, while favourable evidence has not been mentioned at all,—"quæ desperat tractata nitescere posse, relinquit;"—that the whole speech, as reported, is marked by that hasty and superficial acquaintance with a subject which generally suffices for the eager credulity of predetermined hostility; that bad history, bad law,

mis-stated and mistaken facts, unfounded premises, wrong conclusions, much presumption and little knowledge, are the characteristics of an oration addressed to an audience for the most part unable or unwilling to criticise its accuracy. If this should be the result of the examination, why then I shall still remember, without blushing, that I belong to the profession of Lord Stowell, and I shall hope that Parliament will not decide upon its abolition, or upon a measure equivalent to its abolition, without hearing the defence as well as the attack.

Before I enter into the consideration of these several matters I must premise one general observation, though perhaps it be scarcely necessary, that is this: when a particular branch of the law is selected for animadversion on account of the alleged abuses prevailing in it, it must, upon every principle of fairness, be understood that these abuses are such, not *abstractedly* considered, but by practical *reference* to and *comparison* with other branches of the law; it cannot be meant merely to declaim against the evils incident to all human institutions, or even more especially belonging to the *general* administration of justice in the highly artificial state of society existing in these realms; because there would be no point, so to speak, in such a declaration, there would be no force in the argument, no sense in the suggestion that one branch of the law should be abolished on account of defects, and its juris-

diction transferred to other Courts possessing those very same defects in an equal or in a greater degree. For instance, when Mr. Bouverie assails the Ecclesiastical Courts on the ground of their delay and expense, he means, of course, to say that they are subject to those vices of judicature in a more eminent degree than the Courts of Westminster Hall or the Courts of Chancery; he must mean to say so, because he would otherwise be attempting, intentionally, which I am sure he is wholly incapable of, to deceive his hearers.

The approved method of attacking the Courts of Doctors Commons has been very little if at all deviated from on this occasion. The usual and time-hallowed course is to state the number, variety and imperfection of the various subordinate tribunals in the country, and, after raising much just indignation upon this head, to fall, under cover of it, first upon the Diocesan Courts, and then upon Doctors' Commons.

This is certainly the most *ad captandum* course for a speech or a petition—I am not so certain that it is so well fitted for a really dispassionate appeal to a judicial mind, and therefore I will take the liberty of reversing the arrangement, and of arguing the whole case according to what appears to me to be its natural order.

I will therefore begin with the attack upon the judicature of Doctors' Commons. I will then proceed to consider the question of the inferior

jurisdictions, showing the important distinction between the Diocesan and the Peculiar and Exempt jurisdictions, the Reforms which are desirable and practicable, and close with some general remarks upon the usefulness of the jurisprudence and profession of the Civilian.

Report of the Commission of 1832 as to Doctors' Commons.

It is very possible that the report of Mr. Bouverie's speech may not do his argument justice, and may sometimes lead me astray in attempting to follow it; but I think I am right in supposing that he expressed himself to the effect that the judicature of Doctors' Commons had been condemned by eminent and competent authority, and was "a reproach and disgrace to our law."

The first appeal to evidence made by Mr. Bouverie in support of this proposition, was an appeal to the Report of the Commissioners appointed by the Crown to inquire into the state of the Ecclesiastical Courts in 1832. He remarks that the Commission "was composed of the most eminent "persons in the Church and in the Law;" and this is quite true. It might be further stated, as a reason for giving weight to its authority, that it was not a one-sided Commission; it was not composed of the members of one branch of the legal profession, it included eminent civilians as well as eminent common lawyers.

This Report, like that of the Church Commis-

sion, was not made at perhaps the most favourable period for sober investigation, inasmuch as it was made in a time of panic and tumult which preceded and accompanied the passing of the Reform Bill. I remember that the Bishop of London replied with much candour and boldness in the House of Lords, to a charge of deviating from one of the recommendations of this Commission, of which he was a member, by his subsequent defence of the Diocesan Courts, that he had become wiser and better informed upon the subject since the Report was made.

Nevertheless, I am far from denying that the Report is entitled to great weight—I have far too much respect for the names of the great lawyers who subscribed it. Let us see, however, whether this Commission did recommend the abolition of Doctors' Commons, or the law administered there, "as a reproach and disgrace to our law." I shall be much surprised, as I think you will be, to find that it did so; because you will remember that every Bill upon the subject which has been since laid before Parliament, including both those brought forward by the administration of which you were a member, had for one of its objects at least the consolidation and confirmation of the Courts at Doctors' Commons. And I say that if the House of Commons were led to believe that the abolition of these Courts was recommended by those Commissioners, they were led to believe the exact reverse of

the truth. For, on the contrary, in this "learned and able Report," (according to Mr. Bouverie's opinion,) the value of the Profession of Civilians is distinctly acknowledged; the breaking it down by opening any other avenue to it other than that of the Universities, the fusing it in either branch, advocates or proctors with barristers and attorneys, is *no where* recommended, though it might have been made to appear otherwise from the language of Dr. Lushington, when examined as a *witness*, cited by Mr. Bouverie. But that gentleman forgot to call the attention of the House to the fact that a different opinion is expressed by the Report to which Dr. Lushington's signature is affixed, and which I will presently quote. It contains no charge of vexatious expenses or delays against the tribunals, but, as I am about to show, commendation of them in these respects. It recommended the transference of certain matters to other tribunals, and the introduction, under certain limitations and restrictions, of trial by jury and vivâ voce examination.

It recommended the alteration of the Testamentary Law respecting Personalty, and the assimilating it to the Law of Realty—a recommendation which has subsequently been carried into effect by legislative enactment, and by which every day the intentions of perfectly capable testators are defeated, and wills actually written throughout in their own handwriting are annulled, to the scandal of English law, which (as I have

often heard the late Sir W. W. Follett remark) is the only country in the civilised world not acknowledging the validity of a holograph instrument. It recommended these alterations, and the annihilation of inferior jurisdictions; but will it be believed by any hearer or reader of Mr. Bouverie's speech that it not only recommended the firm establishment and perpetual maintenance of those " reproaches and disgraces to the law," the Provincial Courts of York and Canterbury; but Tyndal, Tenterden and Wynford, those oracles of the Common Law cited by Mr. Bouverie, advised—what? that the jurisdiction over wills of personalty should be taken from them and given to the Courts of Westminster Hall? Why no—but that the jurisdiction over devises, over wills of realty, should be taken from the Courts of Common Law and given to the Provincial Courts of York and Canterbury, when they had undergone the amendments suggested in the Report.

But this is not all—this Commission, which is represented as having pronounced our sentence of condemnation, actually contains the following passage:—" With respect to the admission of " Proctors, we see no reason to disturb the present " practice. With the alteration suggested as to " Advocates (the admission of Bachelors of Civil " Law to practise under certain restrictions had " been suggested), *the present mode of admitting* " *Advocates and Proctors appears to be well calcu-* " *lated to ensure the acquisition of such knowledge as*

" *may enable them to conduct those causes which are* " *the subjects of Ecclesiastical cognizance with ad-* " *vantage to the suitors and to the public.* And it " may be added, that, from the course of the pro- " ceedings and the nature of the business trans- " acted in Doctors' Commons, the Proctors are " necessarily brought under the constant obser- " vation of the heads of the profession, so that it " is difficult for any attempt at malpractice to " escape detection; but it should be mentioned " to their credit that instances of misconduct are " of very rare occurrence."

From the passage marked in Italics it will be seen that the eminent judges who signed the report differed, *toto cælo,* from the attorneys of Liverpool whose petition Mr. Bouverie cited; the former consider our jurisdiction to be of " advan- " tage to the suitors and to the public," the latter that it is a " daily source of oppression and legal " wrong to suitors."

I cannot find that Mr. Bouverie contrasted these two statements in his speech. The former must have escaped him, for he would agree I am sure with me, that the testimony of the judges who do not wish to practise in the Courts is of a less biassed character than that of the attorneys who do, to say nothing of a pardonable prejudice in favour of a judge's opinion over that of an attorney upon a question of jurisprudence; and I think Mr. Bouverie's knowledge of the prac-

tice in Courts of Common Law must have made him regret that the practitioners therein should select for the object of their proverbial sensitiveness to all abuses of the law—the "oppressions and legal wrongs" of the Ecclesiastical Courts.

The opinions of eminent lawyers and statesmen as to the general advantage of the learning of our profession will find their place in another part of the discussion on this subject; for the present I have sufficiently exposed the complete inaccuracy of Mr. Bouverie's statement with respect to the condemnation of the judicature of Doctors' Commons by high authority.

Having shown, then, that our profession has not only not been condemned, but has been commended and sanctioned by most eminent and unbiassed persons, selected by the Crown to inquire into its constitution and its working, I now feel that the question of the mode of procedure in the Court is disembarrassed of the prejudice which would otherwise have obstructed the fair and impartial consideration of it.

Alleged Specific Instances of the Mal-administration of Justice in Doctors' Commons.

It is asserted by Mr. Bouverie, that these Courts have been productive of grievous injustice and wrong to the suitor, and particular instances are quoted by way of illustration. There will be, therefore, a direct test to apply to the accu-

racy and correctness of this part of the learned gentleman's attack. I hasten to apply it.

The Courts at Doctors' Commons exercise jurisdiction over subjects of Testamentary, Matrimonial, Maritime and Ecclesiastical law.

The former are principally selected by Mr. Bouverie as the object of animadversion. He cites three cases; one he professes to be personally acquainted with, two to take on the authority of a third person. The one which he puts forward on his own responsibility is *Dew* v. *Clarke*, and concerning that he is reported to have spoken as follows:—

" He himself (Mr. Bouverie) knew an unfortunate man, " of the name of Clark, who had been twenty-one years " in the Queen's Prison, under the operation of that " anomaly. Mr. Clark took possession of a large amount " of real and personal property to which he believed him- " self entitled under a will; the Ecclesiastical Court held " the will invalid, on the ground of the insanity of the " testator; the Court of Chancery held the instrument " valid, and confirmed him in possession of the freehold " estate, and yet was obliged, in execution of the judgment " of the Ecclesiastical Court, to order Mr. Clark to repay " the produce of the personal property, which he had " spent, believing it his own. What could be more mon- " strous? Here was a man imprisoned for a great part of " his life on the score of the invalidity of an instrument, " which the highest Court of Equity in the kingdom, that " sent him to prison, actually decreed to be valid."

I am really astounded at the extraordinary incorrectness and gross inaccuracy of the whole of this statement.

The case of *Dew* v. *Clarke* was as follows:—

A *Mr. Ely Stott* died on the 18th of November, 1841, at the age of seventy-two years, leaving a widow and an only child, a daughter. In February, 1821, a commission of lunacy had been issued against him, under which he was found of unsound mind from the 1st of January, 1821. In May, 1818, he had executed a will, by which he bequeathed about 80*l.* a-year to his daughter *Mrs. Dew* for life, and an annuity of 400*l.* a-year to his widow, and gave the residue (subject to some other legacies not considerable in amount) to his nephews, *Thomas Clarke* and *Valentine Clarke*, (to one of whom I presume Mr. Bouverie must refer). His property amounted to about 40,000*l.* The validity of the will was contested by the daughter Mrs. Dew, on the ground that he was not of sound mind. The unsoundness of mind consisted in a delusion which he had laboured under with respect to his daughter.

Sir John Nicholl decided upon this ground against the validity of the will. The judgment delivered by him has been, I speak without fear of contradiction, universally admired by all lawyers as containing the clearest and best exposition of the doctrine of particular delusion, as distinguished from general insanity, in its application to testamentary capacity. It is the leading judgment upon this most delicate and difficult point of law.

The judgment was appealed from to the Court of Delegates,—that Court consisted of Judges of the Common Law and of Civilians.

They *affirmed* the sentence. An application was made to the Lord Chancellor to grant a Commission of Review; and the whole case was elaborately argued by eminent counsel before Lord Lyndhurst. He delivered one of those luminous judgments which will never be forgotten by the bar. But Mr. Bouverie will be amazed to learn that this very eminent person *confirmed* the sentence of Sir J. Nicholl. Here are the concluding words of his judgment:—"I have only "therefore now to repeat, that it does not appear "to me that there has been any error in law in "this case; and further, according to the best "view I am able to take of the evidence, I can "go so far as to say, that if I had been in the "first instance called upon to decide as to the "question of fact, I think that I should have "decided in conformity with the decision pro-"nounced by Sir John Nicholl. Under these "circumstances, it is my duty to recommend his "Majesty *not* to grant this Commission of Re-"view."

What is to be said of the accuracy of the first part of the statement, that the Ecclesiastical Court decided one way, and the Court of Chan-

* Russell's Reports, vol. v. p. 147.

cery the other, upon the same subject matter? Is a grosser inaccuracy conceivable? Yes, what follows,—the assertion that Mr. Clarke was imprisoned for disobedience to the order of the Ecclesiastical Court. The answer, indeed, might well be, that disobedience to the sentence of *every* Court is punished, as every body, whether he be, like Mr. Bouverie, a lawyer or not, well knows, by imprisonment; but the simpler answer is, that the fact is not so. *The Court of Chancery did not imprison Mr. Clarke upon any application from the Ecclesiastical Court,* but for contempt of an order of the Court of Chancery, upon a question in a suit before that Court. It is an equally erroneous assertion that he was ever "confirmed in possession of his *freehold* estate." May I not borrow Mr. Bouverie's phrase, and ask, "Is not this monstrous?" And yet how many cheers may this palpable mis-statement have called down upon the speaker; and, as it remained uncontradicted, how many leading articles may it have furnished for how many newspapers! Has not a profession a right to complain when prejudices are excited against it by such grievous blunders as these, which only escape detection on the spot from the accident of there being no one present who is conversant with the subject on which they are made?

I have shown the extreme inaccuracy of the statement for which Mr. Bouverie relied upon his own authority. I cannot congratulate him

on the impartiality displayed in the selection of the authority which he relies upon for these charges.

" Perhaps he had already adduced sufficient evidence " of the incompetency of these Courts: but, in order to " strengthen this part of the case, he would quote the tes- " timony of a gentleman whose opinions were entitled to " the greatest weight in a matter of this kind,—he meant " the late Mr. Tyrrell. That gentleman said: 'The incon- " venience of the jurisdiction of the Ecclesiastical Court " has probably escaped the attention of the public on " account of the small proportion of cases in which the " validity of a will is disputed; but by the few persons who " have had the misfortune to be involved in their proceed- " ings they are loudly condemned on account of the nature " of their forms, their insufficient means of eliciting truth " or doing justice, and their enormous expense. In the " only two cases with the facts of which I am acquainted, " *Ingram* v. *Wyatt*, and *Marsh* v. *Tyrrell and Harding*, I " have the most perfect conviction that the sentences were " wholly contrary to justice.' "

Now I must say that if Mr. Bouverie had been at all acquainted with the history of one of those cases, he, and as a lawyer more especially, would have thought Mr. Tyrrell's evidence entitled to the least, instead of to the greatest, weight in these instances. The very name of one of the cases ought, I think, to have excited the suspicion of a mind accustomed to think judicially, and imbued with the first principle of jurisprudence, " *Nemo judex esse debet in propriâ causâ.*"

In the case of *Marsh* v. *Tyrrell and Harding* the principal facts were these: Three Mr. Tyrrells

were concerned in the making of a will by an old woman. Mr. Tyrrell, the conveyancer, was appointed an executor; Mr. Tyrrell, the surgeon, was called in as medical adviser; Mr. Tyrrell, the solicitor, made the will. Sir John Nicholl pronounced against the validity of this instrument. There was an appeal to the Court of Delegates, where the litigation was stayed by a compromise. Nothing can be more natural than that Mr. Tyrrell should dislike the Court which had "such insufficient means of eliciting the truth;" nothing more surprising than that a lawyer like Mr. Bouverie should think his evidence against the Court "entitled to the greatest weight."

While this opinion of Mr. Tyrrell is so prominently put forward against the Court in which he was a *quasi* disappointed suitor, no mention is made of other evidence given before the same commission by another witness, who was certainly without any apparent bias in favour of our Courts, and who was certainly very competent to give evidence upon this point—Mr. Freshfield, formerly a Member of Parliament, the Solicitor to the Bank, a gentleman of great experience in the practical detail of the different modes of proceeding in all the Courts, and who on this account, and also because his official connection with the Bank led him of necessity into a close acquaintance with the working of the testamentary branch of our profession, was twice examined

before Commissions on the state of the Ecclesiastical Courts. This gentleman underwent a very long and elaborate examination, during which he declared it to be his firm opinion that the truth was better elicited by the mode of proceeding in the Courts of Doctors' Commons than in any other Courts in the kingdom. The passages in his evidence upon this point you will find in the Appendix to this letter. I find no mention of this circumstance in Mr. Bouverie's speech.

The other case, that of *Ingram* v. *Wyatt*, was long and complicated. It concerned the will and codicil of a Mr. Clopton. The disposition of the property was in favour of a stranger in blood, the *attorney* and agent of the deceased—who was appointed sole executor, and almost universal legatee. The will was prepared from instructions conveyed by *another attorney*, who was also the *father* of the executor, the codicil was prepared by the executor *himself*. No case could be fraught with more circumstances of suspicion.* The sentence of the Judge against these testamentary dispositions was reversed on appeal; and this is cited with a touching simplicity as an argument against our Courts, as if the reversal of a judgment was a matter wholly unknown to the Courts of Equity and Common Law. Mr. Bouverie did not know, for he has not stated, that Lord Chancellor Brougham when applied to for a Commission of Review, though he refused the appli-

* 1 Haggard's Reports, 384.

cation, declared that if he had, in the first instance, had to decide the case, he should have done so in accordance with the judgment of Sir John Nicholl.

If Mr. Bouverie, in the further prosecution of his legal studies, will look at the first edition of what is acknowleged to be the best work ever published upon the subject-matter of these judgments,—if he will cast his eye upon the dedication of Mr. Justice Vaughan Williams's well-known Treatise upon Executors and Administrators,—he will find that it was inscribed to the Judge who delivered the sentences in the cases which Mr. Bouverie and Mr. Tyrrell condemn, "on account of his eminent judicial abilities."

I should also wish to invite the attention of Mr. Bouverie to another *particular* passage in the Report of 1832, so much *generally* relied upon by him in his attack upon our profession.

"The judgments of the Prerogative Court (that is, the "Will Court) in testamentary cases have generally been "satisfactory to the public: many decisions have been "acquiesced in by the parties: and of those appealed from "very few have been reversed.*"

So much for the evidence furnished against our profession by the conduct of a Judge who is dead. Now with respect to the unfavourable inference which it is suggested or hinted is to be drawn from the administration of justice by a Judge who is living.

* Report of 1832, p. 35.

I am sorry to say that Mr. Bouverie, snatching up in the blindness of his honest but ill-informed zeal, any weapon that seemed likely to injure the jurisdiction he was assailing, spoke of a general belief that the connections of one of the Judges in Doctors' Commons choke up the avenues to justice. He cited two cases in proof of this—one of them *Geils* v. *Geils*—omitting to state that in this case the Judicial Committee of the Privy Council had confirmed the sentence of the Judge upon an interlocutory matter appealed to them, and remitted the cause to him; further omitting to state that the Judge decided *against* the party who had employed his connections, and that no appeal has been prosecuted from his sentence. I forbear, for other and obvious reasons, to state why I think all mention of this case should have been avoided.

I am reluctant to say any thing about the other case, *Farnall* v. *Craig*, because I was junior counsel engaged in it. The question was chiefly one of the credibility of evidence, and my opinion was and is in favour of the party against whom the sentence was given; but surely there is a manifest indecency in citing a case in which an appeal is actually pending, and in which the authority cited is a pamphlet written by the brother of the party appealing.

I am not expressing any opinion as to whether it be, abstractedly, desirable or not that many of the relations of the Judge should practise in or

be connected with the Court over which he presides. I am merely dealing with it as an alleged reason for the destruction of a profession. I believe that no act of parliament will alter or amend human nature; and that when a man has risen to the top of his profession, whether it be in the Court of Common Pleas or Exchequer, or of the Vice-Chancellor of England, or of Doctors' Commons, his relations will be disposed to embark in the same profession, partly with the hope of sharing any patronage in his gift, or recommendation, partly for the advantage in the way of business which may accrue to them from bearing his name. The question for the public will always be rather the propriety or impropriety of an appointment with reference to the individual fitness of the person, than the accident which may have given him the preference over others equally qualified. As to corrupt partiality shown towards connections who have the management of suits in the Court, it is to be remembered, independently of the strong presumption against such conduct on the part of an honourable man, that his authority is not without check, nor his sentence without review.

The Court of Appeal from the Court over which that Judge presides is the Judicial Committee of the Privy Council, composed, as the case may be, of Ex-Lord Chancellors, the Master of the Rolls, a Judge of the Common Law, Vice-Chan-

times of the Lord Chancellor and the Chief Justices. It cannot be said that judgments scanned by this tribunal are not exposed to a severe and searching ordeal.

I find that 115 appeals have been prosecuted from the sentence of Sir H. Jenner Fust; and that, including 48 cases in which the appeal was abandoned, and also cases where the decision has been varied and not strictly speaking reversed, and where fresh evidence has been procured and admitted in the transit to the Court of Appeal, 16 only have been varied or reversed.

I should be glad to know what Courts of Justice in the kingdom will bear a better test.

Such is the value of the *specific instances* cited as corroboratory of the general allegations of the Expense and Delay of our proceedings.

I am anxious to go a step further, because it is chiefly under shelter of this disproved assumption, as to Expense and Delay, that the fire is opened upon the profession in general. I have taken some pains, since this recent attack, to inquire into the details of the expenses of a suit in our Courts, and in those of Common Law and Equity, where the same subject-matter is adjudicated upon, the same points of law or fact are raised, and it is my sincere conviction that it will be found that in almost every instance the expenses of our Courts are never more, usually very considerably less, than those incurred in other Courts.

COMPARISON OF THE COURTS IN DOCTORS' COMMONS WITH THE COURTS OF COMMON LAW AND EQUITY—AS TO DELAY AND EXPENSE.

Our Courts exercise jurisdiction, as I have said, over Maritime, Testamentary, Matrimonial and Ecclesiastical subjects; and, with reference to the question of expense, I shall do fairly in stating cases where the *same subject-matter* has been tried in *both* Courts.

1. *In Maritime Cases.*

In 1842 the Legislature passed an Act of very wise reform. The High Court of Admiralty possessed a very ancient but a very limited jurisdiction; the Legislature did not abolish the Court, but they passed a statute increasing its powers and widening its jurisdiction. They found on examination that where it failed to do justice, it was in consequence of restrictions which the bygone jealousy of the Common Law had imposed upon its jurisdiction, and they removed those restrictions. This was a real reform on principle, not abolition on clamour.

The principal subjects of which this Court takes cognizance—are salvage, sailors' wages, collisions at sea and in rivers, and bonds given on hypothecation of the ship and cargo in foreign ports, commonly called bottomry bonds.

The machinery by which it works is of two

kinds, the very simple, expeditious and cheap one of petition (which is the statement of facts), affidavits, and arguments of counsel: this is the process usually resorted to in cases of slight importance; but for those of a more complex and arduous character there is the more careful and elaborate proceeding by plea and proof. The statute of 1842, which extended the Admiralty jurisdiction in cases of collision to rivers *infra corpus comitatûs*, left it *optional* to parties to proceed in our Court or at common law. Since which extension it is matter of general notoriety that two-thirds of the suits formerly brought in Guildhall are now instituted in the High Court of Admiralty. In suits for sailors' wages there is an advantage in the forms of our Court so great that it only requires to be stated in order to be appreciated. At Common Law *every* sailor would have to institute a separate suit for his wages, in the Court of Admiralty *all* may join in one and the same suit. Now for a sample of the comparative expenses and delays of our and of other Courts, and of the mischiefs arising from their interference. It has been said that the Court decides on the validity of bonds granted abroad for necessaries supplied to a ship in a foreign port. In the case of a ship called "*The Lord Cochrane*," about three years ago, an injunction was procured from the Master of the Rolls to stay proceedings in the Court of Admiralty in a suit of bottomry. The injunction was

obtained because the Master of the Rolls believed that there was no mode of proceeding in the Court of Admiralty but by Petition and voluntary affidavit, whereas it was open to the owners (in technical language) to have prayed a Libel instead of an Act, and the cause would have proceeded by plea and proof. The mode which they had thought proper to adopt was by their own choice or their own error, and then before the Master of the Rolls they took advantage of their own wrongdoing. It was further answered on the part of the bondholder, that the Court of Admiralty possessed a machinery of its own peculiarly adapted to these investigations, viz. through the agency of merchants attached to the Court, by whom, as competent persons, every item of the account would be investigated. The legality of the instrument, whether affected by fraud or otherwise, would be determined by the judge, the propriety of its amount by the registrar and merchants, whereas there are no such officers attached to the Court of Chancery, which must necessarily create for the special purpose some such forum, or obtain in some other manner, incomplete and unsatisfactory, the necessary information. The Master of the Rolls, however, conceiving that the only mode of proceeding was by petition and voluntary affidavit, granted the injunction—and what has been the consequence! Why, after a lapse of *three years* the

parties returned to the point and the place whence they had set out in search of a better jurisdiction. The effect of the litigation and delay in the recovery of the money secured by this bond upon the commercial credit at Pernambuco, where the transaction took place, has been such that money has been even taken up on bottomry at a premium of fifty per cent., merchants in that port refusing to advance necessary funds at a less price.

*The Switzerland** was a cause of collision between two vessels, one, the Switzerland (an American line of packet ship), and the other, the Juno (a Swedish vessel).

The action was entered in the Admiralty Court on the 13th of July, 1846, and by the 28th of the same month the whole of the evidence on both sides was taken, and the Judge (Dr. Lushington), assisted by two Trinity Masters, on the same day gave sentence, and referred the amount of damage to be ascertained by the Registrar and Merchants.

This important cause, therefore (for the damage was very considerable), was begun, heard and determined *in one fortnight.*

The evidence of upwards of thirty persons was taken; and although there were the subsequent proceedings before the Registrar and Merchants, as to the amount of damage and the accounts, yet the whole of the costs on both sides (including the fees to the Registrar and Merchants), did not amount to more than £240.

* Not reported.

*The Friends** was a cause of collision between two vessels.

The proceedings in this cause in the Court of Admiralty occupied from about the middle of November, 1842, to the 24th of January, 1843 (little more than two months), when the Judge (Dr. Lushington), assisted by two Trinity Masters, gave sentence in the cause.

Twenty persons gave evidence, and the costs on both sides did not exceed £200; whereas the very same question has been tried at Common Law (the defendant at Common Law being plaintiff in the Admiralty Court), where the time occupied a period of three months, and the costs on both sides amounted to £300.

I believe there is no case of this description in which the comparison might not be most advantageously instituted for Doctors' Commons.

2. *In the Testamentary Court.*

The next comparison shall be between the trial of the validity of a will at Doctors' Commons and at Common Law; and first, I must observe that intimately and obviously connected with the questions of expense and delay in this matter, is the subject of Courts of Appeal. How stands the comparison on this point? From a case begun in a Diocesan Court there are two appeals, first, to the Court of the Province, then to the Judicial

* Reported in Notes of Cases, vol. ii. p. 92.

Committee of the Privy Council. But, generally speaking, most causes on which an appeal is likely to be prosecuted, are begun (through Letters of Request) in the first instance in the Court of the Province, and therefore, practically, there is seldom more than one Court of Appeal, and, let it be remembered, one tribunal both on law and fact. Now, at Common Law, there are, *practically*, Courts of Appeal on the law, and Courts of Appeal on the fact. For instance, a cause is heard at *nisi prius;* there may be any number of *new trials*, two are not rare; each new trial probably would be upon questions of *fact;* but suppose a point of *law* is reserved by the judge at *nisi prius*, how many Courts of Appeal may there be? first, there may be what is practically an appeal to the Judges *in banc;* secondly, (by Bill of Exceptions) to the Exchequer Chamber; thirdly, to the House of Lords; and these different appeals upon the question of *law* may be upon the same cases in which there have been two or more appeals upon the question of *fact.*

Most assuredly this is not a matter upon which Doctors' Commons need shrink from comparison with Westminster Hall. Hear Lord Campbell's evidence upon the question of new trials.*

"Can you state what is about the average "number of *new trials* applied for after *each* "*circuit?*—I should think in all the Courts nearly

* Report of 1832, p. 227.

" one hundred, upon an average (and this, it will " be remembered, was in 1832).

" Have you any means of knowing what pro- " portion of the applications are successful?—I " should think that in about one half of the cases " the application is refused in the first instance, " and probably, I should think, that in two-thirds " of the remaining cases, finally, the application " is refused after cause shown.

" It still happens, therefore, that the verdict by " a jury is not always satisfactory?—Certainly " not: *the trial by jury would be intolerable, if it* " *were not for the power of granting a new trial;* " *for juries, sometimes from ignorance, and more* " *frequently from prejudice, give verdicts which are* " *absolutely unjust.*

* * * * *

" Do you know what number of new trials " upon issues have been granted in the Courts of " Chancery?—I know upon the Duke of Rox- " burgh's will, the present Master of the Rolls " has ordered a *third* new trial, but that is very " rare; and in the case of *Davis* v. *Morris*, there " were *three* trials."

But there have been cases in which *four* new trials have been granted; and I find it laid down that " Courts of Equity are much less strict in " granting new trials than Courts of Law, it being " necessary not that the question should be decided " to the satisfaction of others, *though ever so often,*

" but that the conscience of the Court should be " quite satisfied."* This very term there has been a case called *Braine* v. *Mather*, decided at Doctors' Commons, in which there have been two trials and two *conflicting* verdicts at Common Law. Now, as far as my researches have extended, and I have not selected cases, but taken them at random, I find that it may be asserted as a correct proposition, that very rarely, if ever, does the expense of trying the validity of the will in Doctors' Commons exceed the expense of trying the devise at Common Law, *where there is one trial*, and that in most cases the expense is much less. It is not difficult, therefore, to see that in the many cases where *two* new trials (to say nothing of *three* or *four*) are granted, the expense at Common Law must be double that of Doctors' Commons. Because, if it be said that there may be an appeal to the Privy Council in the latter, so there may be an appeal to the Exchequer Chamber and the House of Lords in the former case; and, as to the Court of Equity, there may be one or more new trials as well as the appeals from a Vice-Chancellor to the Lord Chancellor, and from him to the House of Lords; and that any careful investigator of the truth, who will examine this question in further detail than can here be produced, will find the general practice of suits, where concurrent or analogous jurisdic-

* *Stace* v. *Mabbott*, 2 Vesey, p. 553.

tion obtains, to be greatly in favour of the Courts of Civil Law.

The following case appears to me to afford an undeniable evidence as to the comparative economy of the proceedings at Common Law and Doctors' Commons. A curious point of law has recently been decided by both tribunals,—first, by the Prerogative Court; secondly, by the Court of Exchequer, which followed and adopted the decision of the former.

The question to be solved turned upon the due construction of the 21st Henry VIII. c. 5, s. 3: Whether, when two executors have been appointed to a will, and one has acted, and the other renounced, the former being dead, the ordinary might grant administration without citing the surviving executor who had renounced.

The *same* point of law was raised,—the *same* cases were cited,—the *same* conclusion was arrived at. Two things, however, were *not* the same: the names* of the cases, and the expenses.

The costs on both sides were—

In the Prerogative Court, (Doctors' Commons)		In the Court of Exchequer,	
Under	£35	Above	£200

Another case has also very recently been decided at Doctors' Commons, which seems to me to throw considerable light on the question of

* In Doctors' Commons, *Harrison* v. *Harrison*, 2 Robertson's Reports, 406. In the Court of Exchequer, *Venables* v. *The East India Company* (11 July, 1848), not yet reported.

expense as necessarily incident to the modes of procedure in these Courts and in those of Common Law,—the case of *Wintle and Dowding* v. *Ford and others*. It is as follows:

Slack, the testator, died in the summer of 1845, possessed of large personal property. He had made, through his professional advisers, a will and four codicils. After his death a spurious will and codicil were uttered by an old man named Ford, aided by his two sons.

After a delay, arising from peculiar circumstances (foreign to the point), a suit was instituted, by the rightful executors, in the Ecclesitical Courts, to ascertain the true will.

In July, 1846, Ford appeared to substantiate the spurious documents. One of his sons and a man named Lewis gave evidence in the cause (as attesting witnesses to the spurious codicil) of having been present at the due execution of both will and codicil.

Evidence at considerable length was adduced by the rightful executors to disprove the forged documents.

In August, 1847, the cause was decided, the asserted documents pronounced against, and probate of the genuine will and codicils granted.

The costs on behalf of the executors, including all law charges, witnesses, travelling, and all expenses, amounted to £846. Ford sued as a pauper.

The three Fords, Lewis, and a Mrs. Garland, housekeeper to Dew, were committed by the Bath magistrates, in the autumn of 1847, for trial on the charge of forging or uttering or abetting the forgery.

The trial came on on the 10th April, 1848, and on the 12th (the prosecution as against Mrs. Garland having been withdrawn, and on that day old Ford having died in prison before trial) the other three were convicted and transported.

The expense of committals, grand jury, and of the trial, amounted to £1500 or thereabouts.

Forty-five witnesses were actually detained in the assize town (Taunton) from Monday the 3rd April, the day of summons, to Thursday the 13th.

The issues to be tried were in effect substantially the same in either Court, the question at Doctors' Commons being, was the will forged? at Taunton, were A. and B., &c. the forgers, or abetting the forgery?

The circumstances were such, that if the will was forged, A. and B. were clearly the forgers or abettors; the same evidence, therefore, solved both questions. To implicate C. (the second of Ford's sons), who had not sworn in Doctors' Commons to seeing the will and codicil executed, evidence of handwriting and of circumstances was gone into at the trial; but so also was it in Doctors' Commons, although the case was made a little more complete against C. at the trial, and some allowance for additional expense on that

score may be conceded. But substantially the proceedings were identical.

The expense of the one was £846, the other £1500. Delay in the case at Doctors' Commons twelve, at Common Law seven months; but then the case had been already elaborately instructed as to evidence and facts before it was tried at Common Law. In this case, and at the end of seven months of incarceration, an innocent person (the housekeeper) was acquitted.

There were two indictments; in one the spurious will, in order to satisfy the requisitions of the Common Law forms of proceeding, was *set out at length thirty-five times.* This calls for Mr. Bouverie's reforming hand rather more than Diocesan Courts or Doctors' Commons.

The great expense in this case was the *necessary* detention and maintenance of the witnesses for so many days. Now suppose the trial had been a *civil* case of *devisavit vel non,* and had been deferred,—had been made what is called a *remanet,*—from press of business, or any other cause, till another circuit, the whole of this expense would have been in this, as it has been in other cases, incurred anew, and this without taking into consideration the possibility of one or more new trials.

3. *In the Courts of Marriage and Divorce.*

Cases of divorce *à mensâ et thoro* in the Ecclesiastical Court may be compared with those of an

action at law for damages, and of a divorce *à vinculo* in Parliament.

It is not perhaps possible to arrive at a precise comparative average of expense, but from the best evidence which I have been able, using no little diligence, to collect, I am satisfied that the average rate of costs in the Ecclesiastical Courts is very considerably lower than that of the costs of the actions at Law; and Parliament, of course, is far the most expensive tribunal (if it deserves the name) of the three.

The cases of the average shortest time and lowest expense in Doctors' Commons appear from the examples now before me to be under four months and under 50*l.* I believe under five months and under 100*l.* would be admitted to be the shortest period and lowest expense of an action for damage at Common Law.

The following fact may furnish some notion of a comparison with respect to the Courts of Equity *in pari materiâ*:—There was the other day a case in which a wife sought a divorce from her husband on the ground of cruelty; and at the same time, upon the *same ground*, the custody of her minor children. The expenses for one party in Doctors' Commons (aggravated by contumacy) were 204*l.* 7*s.*, —in Chancery (without the appeal) between 600*l.* and 700*l.* The decision in both cases depended upon the proof or disproof of the same fact, viz. the cruelty of the husband.

4. *In Cases of an Ecclesiastical Nature.*

The Braintree Church Rate Case has obtained an unenviable notoriety; but as it was hotly contested in both the Ecclesiastical and Temporal Courts, I will take the liberty of referring to it as illustrative of the comparative expense and delay of both tribunals. It was certainly a case which, from the extreme importance of the principle involved in it, required great consideration, and, therefore, justified some delay in the hearing and the judgment; on the other hand, the magnitude of the question must have made the judges very desirous to leave the country in doubt as to the law as short a period as possible. It has been twice argued in both Courts.

First, as to DELAY.

First Cause.

In the Ecclesiastical Court.	In the Queen's Bench.
15 Nov. 1837. Libel (i. e. Plea) admitted.	17 Nov. 1837. Prohibition issued.
17 Nov. 1837. Stopped by Prohibition.	Trinity Term, 1839. Argument on demurrer.
	August, 1840. Judgment of Queen's Bench.
	Michaelmas Term, 1840. Argued in Exchequer Chamber.
	Hilary Term, 1841. Judgment.

Second Suit.

Ecclesiastical Court.	Queen's Bench.
4 May, 1842. Libel (Plea) rejected by the Judge of the Consistory. 25 March, 1843. Sentence reversed by the Dean of the Arches. Prohibition thereupon.	25 March, 1843. Prohibition issued. 3 Feb. 1847. Lord C. J. Denman delivered Sentence in favour of the Rate. Thereupon Writ of Error to the Exchequer Chamber. Argument partly heard, and now stands over till Michaelmas Term.

Secondly, as to Expenses (taking those of one side only).

First Cause.

Ecclesiastical Court.	£	s.	d.	Queen's Bench.	£	s.	d.
Proceedings in the Consistory of London . .	111	4	0	On application for Prohibition	244	17	1
				In the Exchequer Chamber	215	19	

Second Cause.

	£	s.	d.		£	s.	d.
Proceedings in the Consistory of London . .	153	8	0	In the Queen's Bench . . .	245	3	
In the Arches (Appellate Court) . .	84	5	10	Exchequer Chamber (not yet known.)			

I wish to state most clearly and emphatically that it is not at all my intention to cast the slightest imputation upon those by whom cases are conducted either at Common Law or a Equity. My object, on the contrary, is to show

that the mode of proceeding, the amount of business, and other circumstances, of necessity render actions and suits in these Courts tardier and costlier than they are in Doctors' Commons. And that, if the fact be so, there is an end of the argument that there would be any gain to the public in transferring the jurisdiction of the latter to the former tribunals.

General Evidence as to Delay.

If our Courts come thus triumphantly out of the comparison with Courts of Equity and Common Law upon the important question of Expense, not less will they be found to do so upon the almost equally important question of Delay. The argument upon this point has been somewhat anticipated by the preceding observations, but there is yet a fact to which I desire to call particular attention.

But did the Commission, upon whose judicial opinion Mr. Bouverie appeared mainly to ground his attack, make any and what reference to those wholesale charges of extraordinary delay and expense? Those who heard or read Mr. Bouverie's speech will be surprised to learn that the following very pertinent and remarkable passage is to be found in their Report:

"If both litigants (they say) are disposed fairly "to proceed to the investigation of the matter in

" dispute between them, whatever be the nature " of the cause, and however opposed and contra- " dictory may be the view they take of the facts " on which each means to rely, there is scarcely " any case, however complicated, which may not " be brought to a final hearing within a year. In " the testamentary cause respecting the late Mr. " Farquhar's will, where the property at stake " was about half a million; where the main fact " was whether the testator had himself privately " destroyed a duplicate of his will, which was " in his own possession; and where a just con- " clusion could be formed only from circum- " stances involving nearly his whole history, " tending to show the probable intention of his " revoking his will, his affection towards his " family, his transactions respecting his property, " his own contradictory and insincere declara- " tions; no less than 125 witnesses were ex- " amined, whose depositions occupied 908 folio " pages; still, under all these circumstances, " the first allegation having been given in Feb- " ruary, 1828, the sentence was finally pro- " nounced in February, 1829; the cause being " concluded in about twelve months."*

Another passage will be significant to all lawyers, and to all who have been concerned in lawsuits (φωνᾶντα συνετοῖσιν).

"On the first day of each term, all causes in

* Page 71.

"which no step has been taken to advance "their progress in the course of the preceding "term, are publicly called by order of the Court, "and, unless satisfactory reasons be assigned "for the continuance of the proceeding, the "trial is dismissed."* Of what other Courts can this be predicated? And, again, "By "certain orders of Court made a few years ago, "the witnesses must be examined in the vacation "succeeding the term in which the allegation to "be proved is given, unless the term probatory "is extended by the Court, upon special cause "shown. These orders have tended materially "to expedite causes which before, from delay in "furnishing instructions to the Proctors, gene- "rally proceed at a slower pace. Many short "cases are now disposed of in a single term: and "it scarcely ever happens that a cause ready for "hearing at the end of a term, goes off to a fol- "lowing term."

I do not say that it was the part of an advocate for a particular cause to state all this overwhelming evidence against his argument, but I do say that the omission to do so shows both that Mr. Bouverie's speech was that of such an advocate, and an uncharitable person might say that he must have calculated largely on the prepossessions or the ignorance of his audience.

* Page 71.

In 1833 the Queen's Advocate, examined before a Select Committee, was asked:

" Is there any arrear of business in that Court?—Not " a single case, I believe, is now unheard.

" It is stated in the Return, that the average time of a " cause depending, from the giving in the first plea to the " final sentence, is eight months; is not that, in point of " fact, the whole time, including the time the cause is in " preparation up to the final decision?—Yes, from the " first appearing of the party to the final decision; it may, " I think, be stated that the average is less than eight " months.

" Is not the condidit, the first plea, usually given in with- " in a very few days or within a very few weeks of the " death of the party?—Where the parties have once de- " termined to contest the will (for it depends upon them), " the Court having no means of compelling them to insti- " tute the proceedings immediately, but when a suit is once " begun, the condidit is the very first step taken after the " testamentary papers are brought in.

" In point of fact, then, from the date of the first plea " to the final sentence is the whole duration of the cause? " —It is.

" Are you aware of the case of *Colvin* v. *Fraser*?— " Yes.

" What was the amount of the property in dispute in " that case?—Five or six hundred thousand pounds.

" That cause was appealed, but the inhibition was re- " laxed?—The principal cause certainly never came to a " hearing before the Court of Delegates; the inhibition " was relaxed, but I believe there was no appeal from the " sentence on behalf of any of the parties before the " Court in the first instance.

" The sentence was acquiesced in?—It was on behalf " of the executor, who was Mr. Colvin, for whom I was " counsel; it was appealed on behalf of certain school-

" masters in Scotland, to whom certain sums were be-
" queathed as a body.

" In the cause of *Masterman* v. *Maberley*, do you re-
" member the amount of property in dispute?—Two or
" three hundred thousand pounds.

" In the case of *Cooper* v. *Devrienne*, do you know the
" amount of property in dispute?—Two hundred and fifty
" thousand pounds.

" What was the length of time that that cause occu-
" pied?—The first plea was dated the 24th January, 1828,
" and the date of the sentence was the 21st June in the
" same year.

" Was there any appeal?—No.

" Was there any appeal in *Masterman* v. *Maberly?*—
" There was an appeal asserted but not prosecuted.

" What was the length of time that that cause was pend-
" ing?—From the 1st July, 1828, to the 13th January,
" 1829.

" What was the amount of the property there?—Three
" hundred thousand pounds.

" What was the amount of property in *Riandey* v.
" *Cooper?*—Two hundred and fifty thousand pounds.

" What is the length of time?—From the 19th Febru-
" ary, 1827, to the 4th July in the same year."

I am informed that an equally good report of the absence of arrears both as to the Prerogative and the Admiralty Courts may be made at the close of this Term; and again I should be glad to be told of any other Court of Justice of which the same is predicable.

I undertook to show that the attack upon our Courts upon those two points of cardinal importance to the suitors, EXPENSE and DELAY, was capable of being shown by comparison with other

Courts to be wholly unfounded. I say that so far my promise is fulfilled, and my undertaking executed. I say it is demonstrated, that so far the public (though I admit not the attorneys whose petition has been presented) would be injured by the transference of our jurisdiction to other tribunals.

The Mode of Procedure in the Courts of Civil and Ecclesiastical Law.

I now come to another ground of attack upon our Courts, namely, the mode and form of procedure therein—the absence of a jury and of *vivâ voce* evidence.

I will first state what our mode and form of procedure really is, and then consider these two specific objections.

The plea of the Courts of Civil Law, upon which the witnesses are examined, is analogous to the declaration at common law or the bill in equity. But there is this characteristic difference, that it is broken into separate positions or articles, the facts upon which the party founds his demand being alleged under separate heads, according to the subject matter, and the time in which they have occurred. Before the plea is admitted the adverse party may object to it either in the whole or in part: *in the whole*, when the facts altogether, if taken to be true, will not entitle the party giving the plea to the demand which he makes,

or to support the defence which he sets up; or *in part*, if any of the facts pleaded are irrelevant to the matter in issue, or could not be proved by admissible evidence, or are incapable of proof.

This mode of proceeding may be easily shown, and has been admitted by many eminent judges, to be productive of great advantage in preventing surprise, as well as in saving both delay and expense. And it may be favourably contrasted, I think, with the practice at Common Law. Mr. Baron Rolfe, in delivering the judgment of the Court of Exchequer in a recent case (1847), which held a disputed plea to be good, observed, "It is "unnecessary to say, in this stage of the pro- "ceedings, whether the plea, if proved, would "be a good bar, &c. We assume the plea to be "good for the purpose of disposing of the ques- "tion, whether there should be a new trial."* It is clear, therefore, that *after* the cost, and vexation, and delay of a new trial had been incurred, the plea might be held bad, which if it had been in this preliminary stage held bad, would have exempted the suitor from all this evil. This is, it will be seen, the reverse of our practice; and it does not seem difficult to say which is the least oppressive to the suitor.

Every subsequent plea, whether *responsive* or rejoining, is subject to the same rules. And here, again, the contrast with the practice at Common

* *Massey* v. *Johnson*, Exch. Rep. vol. i. p. 253.

Law is favourable to our Court. I may say this boldly, as the ablest writers admit the defect in the doctrine which governs their *replications.*

Nothing can be clearer or more impressive than the following statement from one of the best lawyers of modern times:—

"We have seen that, even since the new pleading rules, the plaintiff has a right to as many counts as he has distinct causes of complaint reducible to the same form of action; the defendant to as many pleas as he has distinct defences. But it is otherwise in the subsequent stages of the pleadings; for the plaintiff is allowed but one replication to each plea, the defendant but one rejoinder to that replication. It seems difficult, it must be confessed, to reconcile this with the ordinary ideas of common sense or justice; for it is plain that there may be two good and sufficient answers to a plea as well as to a declaration; thus, if the defendant in an action for the price of goods pleads '*infancy*,' the plaintiff may have two good answers to this plea; first, that the goods were necessaries, for which the infant might legally contract to pay; secondly, that whether they were or no, the infant ratified the contract after he was of age in a proper and binding manner. Now, both these are good answers to the plea, and both may be quite true, yet is the plaintiff prevented from making use of both of them."

only is the Plaintiff prevented from making use of both his answers b
compelled to admit that one of the Statements in the Plea, which he is by
ding debarred from answering is to be taken against him as true. The Co
ak have said, "We think that an admission made in the course of plea
rrs terms, or by omitting to traverse what has been before alleged, ma

" *Quod quidem videtur perquam esse durum. Sed* " *ita lex scripta est.*"*

Now what is the usual, indeed the only, defence set up for this manifest defect? Why that, if more replications were allowed, the jury would never be able to understand the points at issue; so that the incompetence of the tribunal entails a palpable injury upon the suitor.

Upon every plea in our Courts the plaintiff is entitled, in civil causes, containing no criminal matter, to the personal answers of the defendant on oath.

Whatever parts of the plea the defendant has not admitted in his answers the plaintiff proceeds to prove by witnesses. The examination is conducted by a sworn officer of the Court. Due notice is delivered to the adverse party of the names of the witnesses about to be produced against him, and of the particular parts of the plea which they will appear to sustain; the adverse party is therefore distinctly apprised of the point to which he should address his cross-examination; and he has moreover ample opportunity of inquiring into the character of the witnesses, both generally and relatively to the particular case, who are to give evidence against him, and to shape his interrogatories according to the information he has received. The knowledge

* Elementary View of the Proceedings in an Action at Law. By Mr. Smith, p. 68. See, too, Stephen on Pleading, p. 304.

3.127. Robins v Lord Maidstone. E 4.2.13.816) and the Court of Common Pleas doctrine. (Bonzi v Stewart. 4.M&G.329) yet if evidence were needed, the finger evidence of the unreasonableness and injustice of this rule of Cou , shows the following opinion expressed by one of the most eminent of the I sundays (said Mr Baron Alderson) it seems to me to be unjus

of this, as may easily be conceived, is of powerful operation in deterring the production of corrupt and profligate witnesses. I believe that I am correct in saying, that in *civil* cases, at common law, this advantage does not exist at all, and not completely in those of a *criminal* nature. The practice of examining witnesses on different days is attended with much less expense in heavy cases, where fifty or sixty are examined, than the bringing them all together, and providing them with lodging and food, in order that they may be ready for the trial on a particular day, which may after all be deferred till another occasion, when the same expense must be again incurred. It has also this beneficial consequence, that a witness, however corrupt, and however regardless of the admonition not to disclose what he has deposed, cannot remember so accurately the whole of his depositions in chief, and on interrogatories, so as not to omit some little circumstance, which he may think trifling, but by the comparison of which with the deposition of his fellow witness, the clue is often given to unravel a tissue of fraud. The very objection which advocates so often make, that they are obliged to put interrogatories to adverse witnesses in the dark, and thereby often to injure their cause, by drawing out an answer they little expected, is no objection to those who consider the discovery of the truth to be the object of judicial proceeding;

on the Jury to treat that fact as proved. If that be law, the
lication is of the very essence of justice." (Smith v Martin. 9. Mv

the trial may be less a game of skill* between two advocates; but the conscience of the Court is the better instructed for these revelations which the advocate complains of having elicited. And at least it may be said that a decision given after a calm retrospect of all the minute circumstances of a case, which a judge, who has written depositions before him, may always command, is as favourable to justice as a judgment delivered immediately after the oral examination of witnesses, and the address of the advocate, by which Lord Erskine complained that damages were so often inflamed, when the jury were called upon for their verdict. The depositions, both in chief and on interrogatories, are taken down in writing, sealed up, and opened when the cause is concluded, and ripe for adjudication.

It is a common but very untrue observation, that one witness looks as well as another on paper. It is a remark that never would be made by any person conversant with the practical working of our system. The case is far otherwise. I am convinced that candid experience would support Mr. Freshfield in his opinion, that the cause of truth has been as much, if not more, injured by the timidity, confusion and nervousness of an honest witness examined vivâ voce, than it ever has been by the absence of the opportunity of showing the demeanour of the

* See Mr. Freshfield's evidence, in the Appendix, p. 151.

witness while giving his evidence. But be this as it may, let me ask whether the opposite system of a vivâ voce examination and a jury has been found to answer the end of its institution, viz. that of cheaply and expeditiously eliciting the truth in *civil* cases ?

In fact, are not the most important cases decided without the intervention of either one or both ? Does not every one who can withdraw his property from the caprice of a jury, and submit it to a judge ? The attempt to engraft the trial by jury upon the process of the Civil Courts in Scotland, is now deplored as a signal failure. Perhaps you are aware of the remarkable proof afforded by the working of the New County Courts' system of the general opinion of the mischievous effects of a jury in civil cases. By the statute which created these Courts the number of a jury was reduced to five, and it was left to the option of the parties whether they would have a jury or not. Since the new system has been tried, 267,445 causes have been tried, and only 800 by juries. Look at the vast increase of business in Courts of Equity, at the cases decided before the Privy Council, in Banco, and in the House of Lords.

What do the immense number of cases submitted to *legal arbitrators* signify, and what is the whole system of *legal arbitration?*—A device to escape the prejudice, ignorance and incapacity of a jury.

VIVA VOCE EVIDENCE WITHOUT A JURY.

But it may be said, Let us have vivâ voce evidence without a jury. Now, I am quite ready to admit that there is much more plausibility in this suggestion, and, in my opinion, it might be coupled with another, viz. Why should not we have the advantages of *both* kinds of examination? Hear Dr. Lushington upon this point, who, being an avowed friend of oral examination, gave very recently the following important evidence before the Divorce Committee of the House of Lords.

"Do you think, with the other means that you "have for investigating the truth, that if you had "an opportunity of examining the witnesses and "cross-examining them in the presence of the "Court, your mode of administering justice "would be very perfect?—I think it would. I "would mention a case strongly illustrative of "that, which occurred only about nine months "ago. The adultery was charged with having "taken place at a certain place. There were "three witnesses to the affirmative and four wit-"nesses proving an alibi, and it was all but im-"possible to say to whom best confidence could "be given. Now, if I had had the opportunity "of examining those witnesses vivâ voce, I think "in all human probability my mind would have "been more at ease as to the decision that I gave.

" You said, that, as far as you yourself were " concerned, you were of opinion that an oppor- " tunity of vivâ voce examination would be de- " sirable. Did you mean to say that that is not " the general opinion?—I should doubt whether " it is.

" Have you seen enough of the administration " of justice in the Courts of Common Law to " form an opinion upon the point, whether justice " is not very often misled and perverted by that " very power of cross-examination?—I have not " a doubt about it.

" That is, before a jury?—Yes.

" Supposing the judge has to determine by his " own authority, do not you think he would have " a better means of coming to a right conclusion, " by hearing and seeing the witnesses examined, " than by reading the written depositions?—*The* " *fact is this: the written depositions bring out to* " *you the real gist and point of the case, and you* " *see from those written depositions where the diffi-* " *culty is; and if you then had the witnesses before* " *you, to ask them half-a-dozen questions, in all* " *human probability that difficulty would then en-* " *tirely be removed.*

" Would you confine those questions to the " judge, or would you allow the witnesses to be " examined and cross-examined by counsel?—I " am afraid that you must give the counsel an " opportunity of examining and cross-examining,

" because otherwise a very heavy onus would be " cast upon the judge. He might endeavour to " do his duty, but he might not be able to take " that strong view of the case, either on the one " side or the other, which it is very requisite to " take, even for the purposes of truth.

" Would you allow the judge to determine " when that examination vivâ voce should take " place, or give to counsel the right of claiming " it?—If the evidence was taken, as it is now, " by deposition, I think it might safely be left to " the judge to allow it when he thought fit."

This would be a wise and practicable reform, and it formed part of the Bill of 1844.

Particular Branches of Jurisdiction.

I shall here observe that there are two branches of jurisdiction which have fallen under the censure of Mr. Bouverie, 1. Church rates, and 2. Defamation suits.

1. *Church Rates.*

" Another branch of the jurisdiction of the Ecclesiastical " Courts was on questions of church-rate. All questions " with respect to the validity of a rate were under their " cognizance. Now, these were the courts of the bishops; " the judges were appointed by the bishops; the greater " part of the judges were clergymen of the Church of " England; and yet it was into these Courts that a Dis- " senter, disputing the validity of a church-rate, must go " and have that question decided. Would any one say " that a Dissenter could feel the same confidence in the

" determination of such a Court—the same satisfaction
" that full justice had been done him—as if the case had
" been before one of the common law courts? The com-
" missioners, at any rate, did not think so, for they recom-
" mended that this jurisdiction should be entirely removed;
" but this, like all their recommendations, had been neg-
" lected."

Whatever force there may be in the objection, it vanishes at once if the recommendations be adopted of placing all the Diocesan Courts, as many now are, under the controul of judges *legally* qualified, and of giving the parties to the suit the option of proceeding in the superior courts at once, and in the first instance. I am sure the more this matter is inquired into the more unreasonable it will appear to deprive the Ecclesiastical Courts of this jurisdiction. The validity of the rate often depends upon the propriety of the repair or the ornament for which it is made, and it may, and in these times probably often will, incidentally involve a question of doctrine of the Church of England,—all matters requiring the grave decision of a Court of Ecclesiastical Law; and as far as expense is concerned no case ever did or could occur in the Ecclesiastical Court which would be near, *longissimo intervallo,* to the enormous expenditure of money in the different Common Law Courts in the Braintree case.

I must further add, that if the opinion of the

judge be sustained, as there is no doubt (thanks to the learning and wisdom of the late Chief Justice Tindal) it will be, if the minority be compellable to make a rate for necessary purposes, the machinery of the Ecclesiastical Courts, by which the churchwardens are enjoined, by monition from the court, to effect this purpose, will become, as in several recent instances it has proved to be, of the greatest value, preventing or quelling by timely interference the great evil of parochial quarrels and parochial litigation, and not allowing the burdens of repair, which ought to be gradually spread over several generations, to be accumulated upon one.

2. *Suits for Defamation.*

As to jurisdiction in cases of defamation. These are suits in which one party proceeds against another to compel the recantation of scandalous words imputing an offence, usually incontinence, not cognizable at common law. A malignant person asserts that a respectable woman is unchaste, ought that woman to have no redress but the indignant, though illegal, violence of her husband or brother? The Ecclesiastical Court compels the slandering party, according to modern practice, to recant the slander either in the church or the vestry in the presence of the clergyman and the churchwardens, and to certify the Court within a given time that she has done so. If the

matter ended here there would be not much dispute as to the justice and wholesomeness of this discipline. But costs are to be paid. Mr. Bouverie is reported to have said:

"The returns upon the table of the House showed that "several persons were actually in prison for non-payment "of costs, their periods of confinement ranging from twelve "months to one month. The use of such language as "formed the subject of these suits, was, undoubtedly, un-"justifiable; but it was monstrous to inflict such heavy "penalties upon persons of a humble class in life, for a "comparatively trivial offence. How it must confound "people's notions of justice to see a woman brought before "the Ecclesiastical Courts for having spoken words in "heat, and subjected to a ruinous penalty, when if that "woman were brutally assaulted by a man, and should "bring the assaulter before a magistrate, the utmost "punishment which could be inflicted upon him was a "fine of 5*l*."

My first observation on this would be, that the temporal punishment was shamefully inadequate, rather than that the ecclesiastical punishment was too severe, for the offence. But I readily admit that in these cases imprisonment is highly inexpedient as a punishment for this offence, and that it has become the principal punishment, though not intended so to be. But I think the reparation made to the injured party by the recantation of the slander *in facie ecclesiæ* is very just and perfectly defensible: let that remain; but let all power of imprisonment be abolished.

TRIBUNALS TO WHICH IT IS PROPOSED TO TRANSFER THE JURISDICTION OF THE COURT OF PROBATE.

Everybody is agreed that there must be *a* Court of Probate,—but some attorneys petition Parliament that it should be the Court of Chancery, others, that it should be the Courts of Common Law, in fact, anything but what it is and where it is—that is, where the complainers cannot individually profit by it.

Now why should it be the Courts of Common Law? It is generally answered, first, because it is desirable to assimilate jurisdiction over, as well as the disposition of, real and personal property; secondly, because devises of real property are tried at Common Law.

Let me say a word on both these points.

1st. Until the law of primogeniture be abrogated there never will be any similarity between the two kinds of property. If you descend into the details of the subject, a different rule, bottomed upon a different principle, is found to be applicable throughout the administration of realty and personalty—the things are essentially different, and no act of parliament, were it to make so violent an innovation in the constitution of this country as to repeal the law of primogeniture and the statute of distributions, still not even such an exertion of legislative omnipotence would make

things in their nature unlike amalgamate. I may not stop to remark, that it has been the policy of every civilized country in the globe to facilitate, as much as possible, the transmission of personalty, nor how far and how widely the recent Statute of Wills has invaded this policy.

2ndly. What is the inference from the fact that devises are tried at Common Law, that testaments should be also tried there? I have shown that the Report of the Commission of 1832 came to a directly opposite conclusion. Ah! but think of the evils of conflicting decisions! and this is said with as much confidence as if conflicting verdicts of juries, new trials from the monstrous findings of juries in the very teeth of law and fact, were things unheard of, and not of frequent occurrence. As if the same case had not been sent four successive times to a jury whose verdict had outraged common sense. I well remember a case before the Judicial Committee of the Privy Counsel, where, in answer to a suggestion of counsel of what the finding of a jury would be as to whether a testator had signed or not in the presence of witnesses, the Lord Chancellor Lyndhurst said, "a "jury, why a jury would of course find it was "his will, and not care about the law;" and those who are acquainted with the case of *Jackson* v. *Jackson*, tried not not many years ago before Mr. Baron Parke at York, will appreciate the sagacity and truth of this remark. Indeed, is it not

more than probable that Judges, who have passed their lives in sifting and examining evidence, would possess more qualifications for adjudicating on such a question than twelve men who, for the first time in their life, were called upon to consider it, and kept without food (most sublime invention!) till they agree upon it. But our adversaries are not beaten—they are content to abandon the Courts of Westminster Hall provided they may take refuge in the Court of Chancery. Here, they say, is the *proper forum* for the Probate of Wills.

Now how stands the case at present, and what are the advantages which the Court of Chancery possesses over Doctors' Commons?

It will hardly be believed by the uninitiated, or, according to legal phrase, by *laymen*, that there exists at this moment a manifest and palpable deficiency in the Court which takes cognizance of realty; and for this reason it will hardly be believed,—because it is the aid which Doctors' Commons affords to the Court of Equity which prevents this deficiency from being as severely felt as it would otherwise be. In the latter Courts a will may be proved in two ways: 1st. In common form, that is, on the simple oath of the executor or party entitled to the greatest interest under it—and by far the greatest number of the wills of this opulent country are, to the undeniable and manifest convenience of society, so proved. 2dly. By

solemn form of law, that is, by examination of witnesses. Now it so happens that the Courts of Realty have no means of proving wills otherwise than by the latter mode, so that whether a will be contested or not, the most expensive and most dilatory mode is of necessity adopted. If any change is to be made, an impartial person might be pardoned for agreeing with the Ecclesiastical Commissioners, that the cognizance of wills of realty should be transferred to the forum which had the better and more efficient machinery, not that the forum which has the good and efficient machinery shall be abolished, and this machinery be transferred to the *forum* which at present has it not. It is equivalent to saying, in plain English, it is so very troublesome to be always borrowing your aid, that we should prefer, merely for the interest of the state, to take possession of your purse! It is of course assumed throughout, that the Court of Chancery is remarkable for the economy and swiftness of its proceedings. Some perhaps may remember the famous illustration which Mr. Windham borrowed from it, when he assailed the conduct of the government for the expedition to the Scheldt, and especially their declaration that they had expected to take Antwerp by a *coup de main*—"I should as soon have "thought" (said that eloquent and gifted man, amidst the general laughter of the House) "of a *coup de main* in the Court of Chancery." Let me

not be misunderstood; the Court of Chancery is unquestionably the fountain of a most valuable jurisprudence to the country; it is hallowed by great and venerable names, and the dilatoriness of its proceedings has of late years been much remedied. I feel all reverence and respect for this ancient and august tribunal; but I do not think the practitioners therein are exactly in a condition to throw stones at those in Doctors' Commons, upon the score of delay or expense.

The Government, of which you were a member, most wisely preserved by their Bill, which unhappily never became a Law, the present Court of Probate, instead of transferring the business therein transacted to a Court where every thing is wanting—machinery in the Court—experience in the practitioners,—where there is not even a registry or place of deposit in any part of the kingdom. Surely they would have been sadly wanting in sagacity not to have seen that in fact and truth what was sought was a change, not of a particular system, but of the persons who administered it.

When and why the Jurisdiction of the Ecclesiastical Court is incomplete.

It is a point generally kept out of sight by the adversaries of Doctors' Commons, though it was much pressed upon the attention of the Commission of Inquiry, that where the remedy to the

suitor is less complete than could be wished, it is owing to the jealous interference of other Courts, founded upon reasons for which, if there ever was, there is now no cause.

One illustration has been already given in the case of the bottomry bond in the case of *The Lord Cochrane*, an example which will, I think, have great weight with all impartial persons.

So it may be shown that our jurisdiction over certain matters connected with wills, where it is imperfect, is so through the interference of other Courts. The matters in question being strictly incident to a Court which has the power of probate, have never been absolutely torn away from its jurisdiction, but a mistaken jealousy of days long gone by induced the Court of Chancery to claim concurrent or exclusive cognizance of the subject, on the pretext that complete justice would not otherwise be done. Let me illustrate this position by some examples.

1. Every executor or administrator, on taking probate, swears to exhibit into the Registry of the Court a just and true account of the goods of the deceased, "when lawfully called thereunto." The party having an interest in the due administration of the goods has, therefore, always a right to require an inventory and account of them to be given in on the oath of the adverse party. He must, therefore, be allowed to impeach the accuracy of the account; and so far he is allowed

to proceed in a Court of Probate, but whimsically enough is not permitted to examine witnesses to prove the truth of these averments. The consequence is, that he is compelled to resort to an infinitively more expensive and tedious remedy—a Court of Equity. This anomaly was cured by the Bill introduced in 1844.

2. The cognizance of Legacies belonged for a long time exclusively to the Court of Probate—naturally and properly enough, when it is considered that the executor is clothed with his full authority to act by that Court, and that he has expressly sworn before it to pay all legacies. At last, however, Chancery seized possession of this branch of jurisdiction, also at first, as in the former case, claiming concurrent, and then, in some cases, exclusive jurisdiction. Now the wit of man could not devise a simpler, cheaper form than that which is adopted in the Court of Probate in a suit for the subtraction of legacy, and it would be universally resorted to. But let a husband sue for his wife, the Court of Chancery steps in and prohibits the suit, on the ground that our Courts cannot compel a settlement, though upon what principle, as we adjudicate on marriages and wills, we should not be allowed to do it, would be difficult to say. So, again, let a sum of money be left to an executor *in trust*, an injunction will issue to stay proceedings in a Court of Probate.

3. So, again, according to the Statute of Distributions, the Court of Probate has authority to enforce the distribution of an intestate's effects, but the Court of Equity, upon the pretext that there were no *negative* words in the act, immediately claimed concurrent jurisdiction, while over wills in which there is an executor, and the residue is undisposed of, it inteferes to the exclusion of the Court of Probate.

In all these cases the position is fully illustrated, that where our Courts fail to administer complete justice the fault does not lie with them; and the remedy would be, not their destruction, but the removal of technical obstructions upon points of detail, thrown in their way for obsolete reasons by other jurisdictions. Dr. Lushington suggested to the Commissioners that in these cases a *concurrent* jurisdiction should be given to our Courts and to Equity—the suitor would, of course resort to whichever was the quickest and cheapest remedy. I trust the example set by the Admiralty Court Bill may be extended a little further so as to cure the grievances which I have mentioned. But speaking generally, this evil has been already remedied to a great extent by the comparative infrequency with which Prohibitions are granted. The judges of Westminster Hall during the last fifty years, discovering how often such applications were made for the purpose of obstructing or delaying justice, have been fa

more sparing than formerly in granting them, drawing, most wisely, the distinction between cases proper for an Appeal and those proper for a Prohibition, which had been too often confounded by their predecessors.

Registration.

One more word before I dismiss the subject of Doctors' Commons. Mr. Bouverie is reported to have said,—

> "One important branch of the jurisdiction of those "Courts related to the registration of wills. They claimed "the privilege of registering wills relating to personal pro- "perty; and, as in these times everybody had personal "property, it followed that all wills must be registered "there. A copy of the will was made and deposited, and "that copy was to be received in evidence on all questions "arising out of the will. In point of fact, as far as suc- "cession was concerned, it was a register of title. Con- "siderable benefit had accrued from this arrangement, but "its advantage would be greatly enhanced if it were pro- "perly carried out. The two great advantages of a "register of title were security and accessibility. In both "those points the system of registration in the Ecclesias- "tical Courts was defective."

This passage was pointed out to me by a person thoroughly and accurately conversant with the subject, as not the least among the many errors of this oration. He suggested to me an easy and sure mode of putting its accuracy to the test, which I adopted immediately and on the spot. I went to the Prerogative Registry, and

asked at random and without premeditation or previous notice given, for the Index of the Wills of 1680; I selected a particular name, and begged to see the original and the copy; both were furnished to me within ten minutes. I do not know what deserves the name of accessibility if this does not, and I should be glad to be told of any office of record in Great Britain or Ireland where greater expedition is used. My attention has been since directed to the evidence of Mr. Protheroe, who devoted much time and attention to the whole subject; it is as follows:

"*Question.*—But if it is desired to see the ori-
" ginal will, it can be produced in a few minutes?

"*Answer.*—The will is procured and presented
" to the person asking for it, with the greatest
" civility and readiness, and with extraordinary
" speed."*

Still stronger is the evidence of Mr. Freshfield before the same commission.

" In the cases on which you have been under
" the necessity of making searches for wills in
" the Prerogative Office, has facility been given
" you?—I think nothing can be more perfect, it
" would be fanciful to suggest anything in the
" form of improvement.

" Has it happened to you to have occasion to
" search for a will of an old date?—Yes.

* Report of 1832, p. 175.

" Can you state what length of time has been " required for your attendance before that will " has been found?—It would be an extreme case, " if that will was not found within half an hour; " it would be obtained within so short a time " that no person, except for the purpose of cavil, " would object to the system; no man can go to " the office without coming away with more of " admiration than disposition to complain."

If Mr. Bouverie meant his remark to be *solely* applicable to the Diocesan Registries, the answer is, that, generally speaking, cathedral towns afford special facilities for secure and accessible registries, and that wherever such do not already exist, there would be little difficulty in their establishment.

Ecclesiastical Courts in the Country—Peculiar and Exempt Jurisdictions.

Having, I trust, shown the complete misapprehension of facts, mis-statement of law, and suppression, or rather non-statement, I would say, of evidence upon which the charges against the jurisdiction of Doctors' Commons are founded, I turn to the consideration of the jurisdiction of the Ecclesiastical Courts in the country.

Here, too, Mr. Bouverie's superficial acquaintance with the object of his condemnation is ap-

parent, and his consequent inaccuracy does not desert him. He is reported to have said,

"There was formerly a great number of Courts called "Peculiars, but they had ceased to exercise any jurisdic- "tion, and were no longer, he believed, in existence."

Unfortunately, these Peculiars, more than three hundred in number, have not ceased to exercise jurisdiction, but do still exist for all testamentary purposes, a constant source of lucrative torment to conveyancers, rendering titles difficult and uncertain, and with few exceptions, inasmuch as they usually act on bona notabilia, are of no convenience to the poorer part of the public, being moreover, from the poverty of their emoluments in general, furnished with an inferior class of officers.

Diocesan Courts.

To the Diocesan Courts, situated in the cathedral and principal town of the county, very different considerations seem to apply even now, and unquestionably their usefulness and efficiency would be greatly increased by the abolition of the inferior jurisdictions.

The authority of the Diocesan Courts being confined within certain definite and obvious limits, they do not create those shipwrecks of titles which the Exempt Peculiars often do, and they afford an obvious and undeniable convenience to the dwellers in the country, especially the middle and the poorer classes, who like to transact business

in their own locality, and who have no wish for the vaunted benefit of centralization in London, which would be attended with an unnecessary expense both of money and time. Within the last twelve-month a new local jurisdiction for the convenience of suitors has been created all over the country, and in the same breath it is proposed to destroy the oldest, and what are capable of being made in every respect the most convenient, jurisdictions in the kingdom. These Courts, it should always be remembered, exercise *voluntary* as well as *contentious* jurisdiction. The advantages of the former are so manifest and undeniable, that the impugners of these Courts generally think fit to pass it by altogether, and to attack the contentious jurisdiction. The usual argument against their existence, and that which weighed most with the Commissioners of 1832, who only recommended the abolition of the *contentious* jurisdiction, was that the officers were often persons not legally qualified or competent for the duties assigned to them.

Now, there are two remedies of very simple and easy application, which would entirely remove this objection. 1st, Let it be enacted that only persons legally qualified shall be appointed to these offices; this reform and the abolition of the Peculiars were part of Lord Stowell's Bill in 1812, which Lord Folkestone, the father, I be-

lieve, of Mr. Bouverie, aided by the powerful support of Sir S. Romilly, had the great merit of inducing him to bring forward, and which, Sir S. Romilly thought, "removed much of the evil arising from these Courts." It passed the Commons, and was most unfortunately (as I quite agree with Mr. Bouverie in thinking) rejected by the House of Lords.* 2nd.—Let it be at the option of either party, as it is now at the option of the plaintiff, to have the cause heard either in the Diocesan or the Appellate Court; no injury *could* then be inflicted upon any suitor, as *practically* none is now.

It has been a favourite course with the enemies of these Courts to move for a return of the causes tried in the course of the year, because arduous causes are frequently brought at once by letters of request to the Appellate Court; but the better test of their usefulness is *the amount of litigation saved*, of *voluntary* jurisdiction, the number of persons who have been enabled to take out probates and administrations cheaply and expeditiously in their own vicinity.

As a very moderate example of the result of such a test, it may be stated, that in the diocese of Salisbury alone the number of probates and letters of administration granted within the last five years, ending 31st December, 1847, was 1045.

* See Romilly's Memoirs, vol. iii. p. 45, 113, 114.

the amount of personal property (taking it, in each case, as of the value under which it was sworn for the purpose of ascertaining the amount of stamp duty payable thereon) to which such probates and letters of administration conferred a title being £550,960; and the total *ordinary expenses* £2608: 16*s.*, or, in round numbers, 10*s.* per centum. The number of probates and administrations granted from January 1st to June 28th, 1848, is 100; amount of personal property £64,870, and the total ordinary expenses £260: 7*s.*

Now where would have been the *reform* in having compelled the persons who took out these probates and administrations to have made expensive and inconvenient journies to London? I am convinced that there is no county in England which wishes for the abolition of its Diocesan Court.

I do not select the Court of Salisbury as furnishing an example peculiarly favourable for my argument, for many better might be found, but because it is more immediately within my cognizance; for I am Chancellor of that diocese, being an Advocate practising in Doctors' Commons of more than eight years' standing, and the Registrar being a Solicitor who served under articles in the office of the Principal Registrar of the diocese of Exeter, and who has been the Acting Registrar of the diocese of Salisbury for five years.

Mr. Bouverie is reported to have said that

" The judges were appointed by the Bishops, and it was " entirely in the power of the Bishops what should be the " duration and amount of the authority delegated to them."

This is, as my reader will now be prepared to expect, another blunder. Bishops have no such power. The patent of the last Chancellor is transferred to his successor, and when confirmed, as it always is, by the Dean and Chapter, conveys a freehold to the holder, who cannot be removed by the Bishop or his successor: so that the true proposition is, " it is *not* in the power of the " Bishops what should be the duration and amount " of the authority delegated to them."

Again, Mr. Bouverie is reported to have said—

" As for the origin of these courts, they were the purest " relics of Papal authority existing in this country,—the " monument of the great struggle for temporal domination " which was carried on previous to the Reformation. The " Bishops at the Reformation, in the great scramble for " the property and authority of the Church, picked up " and appropriated this portion of the Pope's power; and " they had acted out what was said to be the true prin- " ciple for a good judge—that of extending his jurisdic- " tion, for they did all they could, in the early period after " the Reformation, to extend the authority of these courts " to every thing cognizable in the ordinary courts; and, " but for the firmness of Coke and his brother judges, " they would probably have succeeded. From that time, " indeed, to the present, there had been a constant cur- " rent of complaint against the abuses and maladministra- " tion in the Ecclesiastical Courts."

Bad history and very indifferent law are the principal features of this passage. It might as well be said that the Archbishopric of Canterbury is "a pure relic of Papal authority." The Bishops did not "pick up and appropriate" this power at the Reformation. They had always appointed learned civilians and canonists to be their Chancellors, and always had Diocesan Courts. The Peculiars were *Papal* exemptions from the authority of the *Bishops'* Courts.

As to the conduct of Lord Coke, Mr. Bouverie must have forgotten that this bitter enemy of every thing but the feudal law of England, of which he was a perfect master,—this honest but most narrow-minded and illiberal man, who called the all-accomplished Raleigh "a spider of Hell,"—this hater of Lord Bacon and Courts of Equity, as well as of Ecclesiastical Jurisprudence, —did lay down as law, with respect to Prohibitions to Ecclesiastical Courts, various important doctrines which have been since completely overruled as bad law by his successors. To say that "from that time there has been a constant current of complaint against Ecclesiastical Courts," —if this be meant for an argument,—is it to say more than might be said of the other Courts of Justice to which it is proposed to transfer their jurisdiction? When Hamlet complained of "the law's delay," he was not alluding to the object of Mr. Bouverie's attack.

Is the view which I have taken of the advantage and usefulness of the jurisdiction of the Diocesan Courts a mere fine-spun theory,—is it a scheme dictated by interest and prejudice? I say it is supported by the highest and the best authority. Who knew better the various modes of administering justice in the different tribunals of this country, who brought a richer experience or a sharper wit to bear upon a question of a mixed legal and constitutional character than Lord Chancellor Lyndhurst? He moreover had seen the fate of various Ecclesiastical Courts Bills; and in 1844 he took this difficult and intricate matter, so to speak, into his own hands. Hear his matured opinion upon this branch of my subject:

"There was really something whimsical in the "course which was pursued by those persons who "were opposed to the continuance of the Diocesan "Courts; he heard on every side clamours for "local tribunals,—for bringing justice to every "man's door. Here they found a system esta- "blished, and they were asked to proceed in an "inverted order and to abolish these Courts. In- "stead of altering these local tribunals they should "endeavour to reform them:—make the experi- "ment. As wise statesmen and legislators they "should not overturn that which was established "until they were satisfied that they could substi- "tute for the existing system something better. "He had had some experience—he had seen sys-

" tems overturned and other systems adopted in " lieu of them; but in few instances had been " realized the views of those who supported the " alterations. Such was the infirmity of human " nature,—difficulties, objections and obstructions " which had not been guarded against were found " to attach themselves to the new system, which " generally in its details was found to work im- " perfectly and disjointedly, and the measures " which were found necessary to adjust it, the " trouble, the time, the expense and the anxiety, " if applied to the old system which had been " subverted, would, in most cases, have accom- " plished the object more completely, more satis- " factorily, and, in all probability, with less trouble " and expense."

And again, " he advised them not to do so " without exercising the utmost caution: and " above all not to attempt it unless they were " fully satisfied, after the most careful and dili- " gent inquiry into the subject, that the establish- " ment of the Diocesan Courts, on an enlarged " and improved footing, was not advantageous to " the community, and that their jurisdictions, by " the appointment of able judges, were not ca- " pable of being made fit instruments in the dis- " charge of their duty, namely, in administering " properly the ecclesiastical law of the country."*

* Hansard's Parl. Debates (March, 1844), vol. 73, pp. 13—19.

I am afraid, if this advice be despised, it will be found, when the mischief has been done, that

. . . "old experience *did* attain
To something of prophetic strain."

Connection of the Diocesan Courts with the Church and the Clergy.

This matter of the Diocesan Court is closely and immediately connected with the very important question of the discipline of the Church, especially as it relates to the Clergy.

Upon this subject Mr. Bouverie is reported to have said,—

"There was only one point upon which their recommendations had been attended to, and that was with respect to the jurisdiction of these Courts regarding discipline and correction of manners of the clergy,—the only particular in which the jurisdiction affected the Bishops themselves, and where they found, to their injury, the expensiveness and dilatoriness and inefficiency of their own Courts. In that particular they induced Parliament to assent to a measure which took them out of the jurisdiction of their own Courts. For the Clergy Discipline Act, 3 & 4 Victoria, cap. 86, provided 'that no criminal suit or proceeding against a clerk in holy orders of the United Church of England and Ireland, for any offence against the laws ecclesiastical, shall be instituted in any Ecclesiastical Court otherwise than is hereinbefore enacted or provided.'"

The fact is true; but it is so carelessly stated as almost inevitably to mislead those who heard it.

The natural inference from this statement would be, that the Bishops, having succeeded in abolish-

ing their own Courts for the purposes of the correction of clerks, had established other Courts, which were found to answer better. This is the reverse of what has actually taken place. No Bishop, since the passing of the act in question, has ventured to try a *contested* case in the new forum established by law, on account of the many defects in this wretched piece of legislation rendering this part of it wholly inoperative, but has invariably sent the case, by letters of request, to the Appellate Court of York or Canterbury.

Preliminary inquiries have been conducted under the act, and very successfully, where the defendant has made no defence; where he has done so the expense has been, in the only case which I have been cognizant of (that of Mr. Monkton), enormous—in consequence, or in spite, of the vainly imagined economy of *vivâ voce* evidence.

The great obstacles presented by the former state of things to the due administration of justice in these matters, did not, in truth, lie in the law itself, but in the inefficiency of those who had to administer it, and in the existence of Peculiars, which thwarted and traversed the legitimate jurisdiction.

The Church, after the Restoration, was stripped of much of her power of discipline over her members; and in her attempts to exercise it, she has

always had to encounter the jealousy with which the Common Law protects all tenure of freehold. The statute of Henry VIII. declares, with great force of language and truth of description, that " this realm of England is a body politick, com- " pact of all sorts and degrees of people, divided " in terms, and by names of Spiritualty and Tem- " poralty;" and in pronouncing the sufficiency of that part " of the said body politick called the " Spiritualty, now being usually called the Eng- " lish Church," to decide when any cause of the Law Divine " was mooted without the inter- " meddling of any exterior person," it proceeds to state that, for the due administration of their office, and " to keep them from corrupt and " sinister affection, the King's most noble pro- " genitors, and the antecessors of the nobles of " this realm, have sufficiently endowed the said " Church, both with honours and possessions." Now, as soon as one of the spiritualty is invested with the temporal endowments of a benefice, he has acquired, according to the law of the land, a right to enjoy them during his life. The benefice is become his freehold, and yet partakes of the nature of a trust, and is therefore liable to be forfeited for certain breaches of that trust. The cognizance of the offences, and their punishment, belong to the Law Ecclesiastical, which invokes the aid of the Law Temporal for the enforcement of its sentence. Now, if it were desirable, it

would be impracticable in this country to deprive any one of a freehold without legal trial and legal proof, and without giving the accused person ample opportunity of defending himself, if he thought fit, by counsel. "Nevertheless, it appertaineth" (says our 26th Article) "to the discipline of the Church, that inquiry be made "of evil ministers, and that they be accused of "those that have knowledge of their offences, "and finally, being found guilty by just judgment, be deposed." The unfitness of the Court in Westminster Hall for a trial of this kind must be obvious to any person of common penetration. Any one who considers that the law is distinct, often governed by different analogies, drawn from different sources, will see that great scandal and little justice would be the too probable consequence. Now the canon law, so far as it "be not contrary to the laws of the "realm,"* governs our clergy; and the greater part of that code is the Civil Law applied to the use and exigencies of the Church. "Ferè omnia "(says Cujacius) sumpsit ex Jure Civili, et omnino quicquid præclarum est in hoc Jure Civili "est, *nec hujus interpres idoneus nisi sit Juris Civilis "peritissimus.*"†

* 25 H. 8, c. 19; see, also, 35 H. 8, c. 16, the statute appointed the commission which produced the *Reformatio Legum Ecclesiasticarum.*

† Ca. 15—De sententiâ et re judicatâ; Halifax, Introd. to Civil Law, xix; Wiseman, 275; Ayliffe's Parergon, 35.

"The study of the Ecclesiastical Law requires "an accurate acquaintance with the Civil Law," says the Report, so often alluded to, of the Commissioners of 1832.

The Civilian, being both necessarily versed in this law and necessarily a member of the Church of England (this being secured by the necessity of his taking a degree at Oxford or Cambridge), combines that admixture of clerical and secular* learning which has been held, wisely I think, peculiarly to qualify him for the office of judge, assessor, or adviser of the bishop—"and *to this* "*end*," says Ayliffe, "they had their officials or "chancellors, men trained up in the *Civil* and "*Canon Law*, to direct them in matters of judg-"ment, *as well in ecclesiastical criminal matters as* "*in ecclesiastical civil causes*, though at present, "through the idleness and corruption of the "times, and through the small regard that some "of our bishops have shown to their own courts, "we have had but few chancellors that under-"stand either the Civil or Canon Law, though "the canon of our church requires a good profi-"ciency in both of these laws in Ecclesiastical "Courts."† Ayliffe wrote about the beginning of the last century; to the evil which he points

* The business of the Civilian, according to Edward VI.'s Statutes, is "quid in illis (legibus Angliæ) jus civile, quid *ecclesiasticum*, quid regni Angliæ jus teneat defineatque."—Lamb. 127, 318.

† Canon 127; see also Lyndewode, l. 1, t. 17.

out I think the chief defect in the Diocesan Courts may be attributed — viz. the appointment of clergymen and persons not qualified by professional studies for the discharge of legal and judicial functions; the original source of this evil was the interpretation put by the temporal courts on the 37 Hen. VIII. c. 17: that statute enacted that all persons, "*as well lay as married,* being "*doctors of the Civil Law,* lawfully created and "made in any university, who shall be appointed "to the office of chancellor, &c., *may* lawfully "execute and exercise all manner of jurisdic-"tion," &c. The real object of this statute was, to transfer the administration of the Civil Law from the priesthood to the laity: it was so loosely worded that the temporal courts held, that, it being affirmative and containing no express restriction, other persons than those "lawfully created" doctors of law might be chancellors.* The Church till lately found another great obstacle to her efficiency and full development in the existence of Peculiars, exempt from the jurisdiction of the Ordinary; these always seemed to me, in every aspect under which they could be regarded, as wholly indefensible.

A properly qualified chancellor might always be of great service to the bishop, preventing many unseemly collisions with his clergy, while in no way derogating from his authority; and

* Walker *v.* Sir John Lovel, Salkeld, 134.

relieving him from a considerable portion of that secular business, of which the bishops continually and justly complain, while satisfying the jealousy of the Common Law in all matters of interference with freehold tenure.

Perhaps, I may add, that if, during the last twenty years, the "Corpus Juris Canonici," and still more, if the provincial constitutions of our own country, as given in Lyndewode, had been more thoroughly known and more deeply studied, the church might have escaped some of those impediments which have been thrown in the way of her discipline and development by Acts of Parliament, framed by her friends and with the best intentions for the support of her interests. It is sad to reflect how often a deeper acquaintance with her jurisprudence would have prevented this hasty and crude legislation; how frequently the positive enactment of to-day has been found to mar the wisdom of her ancient law. I must think that she has often been forgetful or ignorant of the treasures of her own code when she had recourse to Parliament, thereby parting with some of her dignity, and at the same time depriving herself of the possession of a flexible system of jurisprudence, founded on great principles, which, under the direction of prudence and firmness, might have been well adapted to her successive exigencies.

In the present state of the Church (meaning

both clergy and laity) of England, some *legal* tribunal there must be for the decision of various matters, in which the temporal interests both of incumbent and patron are in fact affected, though the proceeding itself may be for a moral or a doctrinal offence. I think the bishops would not be disposed to deny this, even if the jealousy of the Common Law, upon all subjects of *freehold*, were to slumber; for I perceive that questions of Heresy are to be tried by a legal tribunal in the first instance, according to the provisions of a new Clergy Discipline Bill, which has been prepared but not yet been introduced into Parliament. I am not surprised at this.

It is quite conceivable that at a time when different spiritual rulers of the church may not entirely agree in their construction of the formularies of the church, that it may be very desirable to avoid unseemly and dangerous clashing of opinions by a reference to a Court which must decide according to *the law*, as evidenced by *all* the repositories in which that law is contained.

Moreover, the Ecclesiastical Court possesses *forms* by which rights which would otherwise be lost are alone preserved. But the other day a clergyman complained, that his diocesan would not, after examination, institute him to a benefice to which he was presented. The Common Law assists the patron, but has no remedy for the

presentee; but he must not be without one, supposing his complaint to be just. He discovers that the Ecclesiastical Court contains such a remedy. He extracts a monition from the Court of Arches to the bishop, to show cause before the Archbishop's Court why he should not be instituted. Would it be desirable that this case, the nature of which may be easily guessed, should be tried before a jury, rather than before the archbishop, with an assessor, or before the archbishop's official? This law had not been put in force for a century, but the form of proceeding remained to prove its existence, and, I may add, its value. I shall always maintain that the *forms* of the Confirmation Court, if permitted to be put in practice, would be sufficient to secure all that sober-minded Churchmen would desire as a reasonable check upon the Episcopal appointments of the Crown; and that when the Court of Queen's Bench has been equally divided as to the authority of these forms it is not desirable they should be destroyed. No one can, I think, say that, if such a question were unhappily to arise again, that Court would be barred by what has recently happened from pronouncing in their favour.

The Civilians, moreover, are members of Convocation. Bishop Andrews says, in the manuscript notes to his Prayerbook, preserved in the Museum, that their position is analogous to that of the judges in the House of Lords, that they sit

in Convocation "ad consultandum et deliberandum, non ad consentiendum." From the records it would appear that their presence is necessary to the opening of Convocation. In either view they are not an unimportant part of Convocation, and might be a very useful part if that body should again receive the Crown's licence to discuss questions involving the consideration of Ecclesiastical practice and law.* I think that greater expedition, and therefore greater economy, might be introduced into the trial of cases, in which the clergy are principally concerned, in the Ecclesiastical Court, and, possibly, various other improvements; but I am sure that neither in this, nor in any other, respect would the Church or the State be a gainer by the destruction of the Diocesan Courts. In this, as in many other instances, it would soon be found that abolition was not reform. And in this, as in other cases, there would soon be an attempt clumsily to reconstruct that which had been ignorantly pulled down.

The Diocesan Court, properly constituted and purged from defects and abuses, would be the best, as it is the natural, assistant to the Bishop in that most difficult and delicate part of his office, the correction of delinquent clerks.

* See Synodus Anglicana, or the Constitution and Proceeding of an English Convocation, published 1702. London. P. 151, &c.

Reforms suggested.

It is, I hope, apparent from the preceding remarks that I am by no means hostile to a considerable reform of the tribunals of Civil and Ecclesiastical Law both in London and in the Country. I am anxious that the reforms should be conducted upon the principle of preservation and useful improvement, and not of violent and inconsiderate destruction.

I will venture here to state, though it will be in great measure to recapitulate, the outline of the amendment which appears to me both advisable and *practicable*.

1. The entire abolition for all purposes of all the Peculiar and Exempt jurisdictions, so that the number of Courts be under thirty, instead of under of four hundred.
2. The requiring proper legal qualifications for the offices of the Chancellor and Registrar of the Diocesan Courts.
3. The interchange of certified copies of wills and administrations between the Court of London and those of the country, so as to ensure there being in London a complete Registry of all the Testamentary Instruments in the Kingdom.
4. The entire abolition of all *sinecure* offices in all the Courts.
5. The enabling either plaintiff or defendant to institute his suit at once, if he be so minded, in the Superior Court.

6. The introduction, under certain limitations, of *vivâ voce* evidence.
7. The union and consolidation of the different Provincial Courts in York and in Canterbury, so as to have only one Provincial Court in each Province.
8. That suits of every description may be heard upon every sitting of the Court so consolidated, without distinction as to the nature of the suit.
9. That every criminal suit be heard *de die in diem* from the time of the opening of the cause till the close of the argument.
10. In matters of legacy, inventory and account, and distribution, to give concurrent jurisdiction to the Ecclesiastical and Equity Courts, leaving it to the option of the party to proceed in either Court.
11. That the time for Appeals be shortened.
12. That the Courts which have the power to imprison have also the power to release.

There may of course be many adminicular ≋forms necessary and practicable; but I adhere ⊃ this outline as bearing the test of the principle ᴗhich I have already stated.

Conclusion of the First Part.

I trust that I have now executed the first part f the task which I proposed to myself,—that I ıave shown that the Courts of Civil and Ecclesiastical Law have *not* been *vexatious, costly,* or

dilatory in the administration of the few subjects of municipal law entrusted to their care; that, on the contrary, they come out triumphantly from a comparison with the Courts of Common Law and Equity upon these most important matters,—that the Judges of Doctors' Commons have been neither unjust nor incompetent,—that the charges recently brought against these tribunals were such as would not have obtained even a momentary assent, if they had been made before an audience or an adversary capable of putting their gross and grievous inaccuracy to the test of proof.

I have shown that these Courts are capable of being made by a wise reform, which would keep in sight the principle and object of their institution, in every respect cheap, speedy and efficient instruments for the administration of justice.

It has perhaps also already in some measure appeared from the foregoing observations, though necessarily condensed and curtailed as to this matter, that the whole question has its roots much deeper in the social system than may be supposed by those who know no more of it than can be *crammed*—such is the phrase coined by the exigencies of the times, to express the current counterfeit of digested information—for the purpose of making a constituent's speech in the House of Commons. The more the question is considered with relation to the Church as well as the State, the more, I am convinced, will this appear.

SECOND PART.

History of the Civil Law in England and of the Profession of Civilians.

The objections then arising from alleged *practical* evils being removed, I wish to say something upon, what some may despise, the *theoretical* advantage of the profession to which I belong; and I will republish here some observations* written by me some years ago in a pamphlet, but which has been for some time out of print, upon the positive advantages accruing to the State from the distinct profession of Civilians.

To many, I hope, the following little historical sketch of the study of the Civil and Canon Law will not be uninteresting, and few will be so presumptuous as to despise the *dicta prudentum* upon the subject, with which I mean to conclude these observations.

I proceed then to consider, though necessarily in a cursory manner, the degree of influence which the Civil Law has exercised in this king-

* The Pamphlet entered but slightly and incidentally into any explanation or defence of the details of practice and the mode of proceeding in the Courts which administered this law. It was, however, chiefly attacked for not being what it did not purport to be, an answer to various charges brought from various quarters upon these particular grounds against these Courts.

dom, and the advantage which the State has derived from the profession which cultivated that law during the principal epochs of our history.

These remarks, especially such as relate to the period which elapsed between the conquest of the Romans and that of the Normans, shall be confined within very narrow limits, although some acquaintance with this subject is by no means historically uninteresting, and surely far from being unimportant to those who are about to establish or destroy by their legislation a branch of jurisprudence which has existed in the realm for more than a thousand years.

The most superficial reader of English history must know that one main pillar of the greatness and prosperity of his country, is the system and the administration of her municipal law. Far be it from me to utter any sentiment derogatory to this monument and support of our liberties. But its existence constitutes no exception to what appears to be the condition of our being, individual and collective, that all great blessings, national as well as private, are attended with some disadvantage, which partially detracts from their value.

It cannot be denied that the Common Law of England is, to a certain extent, like the territory in which it prevails, of an *insulated* and peculiar character. It must be acknowledged that it has borrowed less than any other State in Christendom

from the jurisprudence of ancient and modern Rome. The fountains of wisdom, experience and written reason, at which the European continent in former and America in later times have so largely drank, were passed by in England with a hasty and scanty draught. The Gothic conquerors of continental Europe fell by degrees and from a variety of causes under the dominion of the laws of the vanquished. "Capta ferum victorem cepit" was eminently true of the restoration of the Civil Law during the middle ages in every country but our own, and yet, for more than three centuries England had been governed by the Civil Law. It is a very remarkable fact, that, from the reign of Claudius to that of Honorius (a period of about 360 years), her judgment-seats had been filled by some of the most eminent of those lawyers* whose opinions were afterwards incorporated into the Justinian code. But all germs of such jurisprudence would have perished with every other trace of civility under the rude incursions of Saxons and Danes, had not the tribunals of the clergy afforded them shelter from the storm;† occasionally, too, some maxims of the Imperial code, admitted either from their

* Papinian, Paulus, and Ulpian. Vide Duck de Usu ac Autor. Juris Romani, l. ii. c. 8, *pars secunda*, s. 7.

† Blackstone, vol. iv. 410; Preface by Dr. Burn to his Ecclesiastical Law; Millar's Historical View of the English Government, vol. iii.; Burke's Fragment of the History of England.

intrinsic merit, or through the influence of the clergy, enriched the then meagre system of English law. The Norman invasion was attended with a memorable change in the constitution as it then existed. The Bishop and the Sheriff had heretofore sat together in the Court of Justice, administering with equal jurisdiction the law upon temporal and spiritual offences; by the charter of William the Conqueror, the Ecclesiastical was separated from the Civil Court. This division has continued (with the exception of a temporary reunion in the reign of Henry I.) till the present period; the Ecclesiastical tribunal deciding, according to the rules and practice of the Civil and Canon Law, generally, on all matters relating to the Church, to the spiritual discipline of the laity, and, among other questions of a mixed nature, upon two of the most important kind, namely, the contract of marriage and the disposition of personal property after death.* It is not necessary to dwell on the original reasons for assigning these mixed subjects to the jurisdiction of the Spiritual Courts. It was an arrangement at the time almost universally prevalent in Christendom.

These, however, were not the only tribunals in which this law was administered. In the High Court of Admiralty† (established about the time

* Burn's Preface, xvii.

† Blackstone, vol. iii. p. 68; Millar's English Government, vol. xi. p. 338.

of Edward I.) all causes, civil and maritime, were decided according to the Civil Law and maritime customs. In the Courts of the Lord High Constable and the Earl Marshal (the Courts of Honour and Chivalry), the mode of proceeding was regulated by the same code.

The Courts of Equity also borrowed largely, and for a long time almost exclusively, from the same jurisprudence. Almost every Lord High Chancellor from Becket to Wolsey, that is, from the Conquest to the Reformation, was an ecclesiastic; and it was a matter of course, that, like every eminent ecclesiastic of those days, he should be well skilled in the Civil and Canon Law. Indeed, it was chiefly because they were deeply versed in this jurisprudence, though partly, no doubt, because their general attainments were far superior to those of the lay nobility, that the dignitaries of the Church were usually* employed in the foreign negociations of this period.† Nor can it be denied by the most zealous admirer of our municipal law that, during the period which elapsed from the reign of Stephen to Edward I., the Judges of Westminster Hall had frequent re-

* Hurd's Dialogues, Moral and Political, vol. ii. p. 183; Duck de Usu, &c. Juris Civilis, p. 364.

† By the Statutes of York Cathedral express provision is made for the absence of the Dean when employed beyond seas in the service of the State. The Bishop of Bristol, who was also Lord Privy Seal, was one of the negociators of the Treaty of Utrecht; the last instance, I believe, of the kind.

course to the Justinian Code; for in truth the writings of Fleta contain many literal transcripts of passages taken from the Digest and the Institutes.*

Lastly, in the Courts of the two Universities the same system prevailed. Universities, which are not the least remarkable institutions of Christendom, had indeed originally been instituted for the express purpose of teaching this science, and even in this country, where the feudal law so largely prevailed, had succeeded in kindling into a flame the precious spark which the schools of the cloisters and the learning of the clergy had preserved from total extinction.†

I pass now to the epoch of the Reformation. On the continent, where the civil law was the basis of all municipal codes, the study of this science was scarcely, if at all, affected by this memorable event. In England it was otherwise. The professors of the Civil and the Canon Law

* Millar, p. 325; Preface to Halifax's Civil Law; Mackintosh's Law of Nature and Nations, p. 52; Lord Holt (12 Mod. Rep. p. 482). "Inasmuch as the laws of all "nations are "doubtless raised out of the ruins of the Civil Law, as all "governments are sprung out of the ruins of the Roman Em- "pire, it must be owned that the principles of our law are "borrowed out of the Civil Law, therefore grounded upon the "same reason in many things."

† See Lyndwode's Life, Biog. Brit. Dedication; Ridley's View of Civil and Ecclesiastical Law, p. 118; Zouche's Preface to his Treatise on the Punishment of Ambassadors, &c., to Henry, Marquis of Dorchester; et vide infra.

belonged chiefly to the Ecclesiastical Courts, and were associated in the minds of the people partly with the exactions* of Empson and Dudley in the preceding reign, and partly with the authority of the Pope. Severe blows were inflicted on the former, which were aimed solely at the latter system.

"The books of Civil and Canon Law were set "aside to be devoured with worms as savouring "too much of Popery," says the learned Ayliffe in his history of the University of Oxford during the Visitation of 1547.† And Wood,‡ after stating "That as for other parts of learning at "Oxford, a fair progress was made in them," observes "The Civil and Canon Laws were al- "most extinct, and few or none there were that "took degrees in them, occasioned merely by the "decay of the Church and power of the Bishops."

In 1536, Thomas Cromwell, Chancellor of the University of Cambridge, Secretary of State, and Vice-gerent of the King in Spirituals, was appointed (by the King's seal used for causes ecclesiastical), Visitor of that University; by the same

* Empson and Dudley justified their exactions by citations from the Civil Law. See Hurd's Dialogues, Moral and Political, vol. ii. p. 211, though they contain a very superficial and very imperfect sketch of the fortunes of the Civil Law in England.

† Ayliffe's Oxford, vol. i. p. 188.

‡ Wood's Hist. and Antiquities of the University of Oxford, vol. ii. book i. s. lxxix. ed. Gutch.

instrument, he promulgated, in the name of the King, certain injunctions, of which the fifth was—

"That, as the whole realm, as well clergy as "laity, had renounced the Pope's right and ac- "knowledged the King to be the supreme head of "the Church, no one should thereafter publicly "read the Canon Law, nor should any degree in "that Law be conferred."*

About the same time, or rather earlier, similar injunctions were issued to the University of Oxford—these are preserved in the State Paper Office, and the corresponding injunction to the one just mentioned is as follows:—

"Quare volumus ut deinceps nulla legatur pa- "lam et publicè per Academiam vestram totam in "jure Canonico sive Pontificio, nec aliquis cujus "conditionis homo gradum aliquem in studio "illius juris Pontificii suscipiat, aut in eodem in "posterum promoveatur quovis modo." These injunctions (for there never was, as is commonly believed, any statutable provision on the subject) underwent some modification from the regulations of Edward VI. In 1535, Henry VIII. appointed certain Visitors, the chief of whom were Richard Layton and John London, LL.D. to visit the University of Oxford; these Visitors joined a Civil to the Canon Law Lecture in every Hall and Inn.

* Strype's Ecclesiastical Memorials, vol. i. chap. xxix. App. No. lvii. lviii.; Cooper's Annals of the University and Town of Cambridge, p. 375.

In 1549, a Visitation of the University of Cambridge took place under the auspices of the Protector Somerset. Bishop Ridley was appointed to be one of the Visitors, and one of the professed objects of this Visitation, according to Bishop Burnet,* to "convert some fellowships appointed "for encouraging the study in Divinity to the "study of the Civil Law; in particular Clare Hall "was to be suppressed." Bishop Ridley found his task very difficult and odious, and wrote to the Protector that, to diminish the number of Divines went against his conscience. Somerset replied, "We should be loth anything should be "done by the King's Majesty's Visitors otherwise "than right and conscience might allow and approve; and visitation is to direct things for the "better, not the worse; to ease consciences, not "to clog them; and further, my Lord of Canterbury hath declared unto us, that this maketh "partly a conscience unto you that Divines should "be diminished: that can be no cause; for first, "the same was met before in the late King's time, "to unite the two Colleges together, as we are "sure ye have heard, and Sir Edward North can "tell, and for that cause all such as were students of the Law, out of the newly-erected "Cathedral Church, were disappointed of their "livings, only reserved to have been in that "*Civil* College. The King's Hall being in a

* Burnet, vol. ii. part ii. p. 222.

" manner all Lawyers, Canonists were turned " and joined to Michael House, and made a " College of Divines, wherewith the number of " Divines was much augmented, Civilians dimi- " nished. Now at this present also, if in all other " Colleges where Lawyers be by the Statutes or " the King's injunctions, ye do convert them or " the more part of them to Divines, ye shall rather " have more Divines upon this change than ye " had before. The King's College should have " six Lawyers; Jesus College some; the Queen's " College and others, two a-piece; and, as we are " informed by the late King's injunctions, *every* " *College in Cambridge one at the least.* All these " together do make a greater in number than the " Fellows of Clare Hall be, and they now made " Divines, and the statutes in that reformed Divi- " nity shall not be diminished in number, but " increased, as appeareth, although these two " Colleges be so united. *And we are sure ye are* " *not ignorant how necessary a study that study of* " *Civil Law is to all Treaties with Foreign Princes* " *and Strangers, and how few there be at this present* " *to the King's Majesty's service therein, &c.*"

Queen Elizabeth, among the statutes which she promulgated for the University of Cambridge, and which have been recently published by Dr. Lamb, enacted one " De Temporibus Lectionum " et Libris prælegendis," (cap. iv.), in which it is ordered, " Theologicus prælector tantum sacras " literas doceat et profiteatur. *Jurisconsultus*

" Pandectas, Codicem, vel Ecclesiastica regni " Jura quæ nos edituri sumus et non alia præ- " leget." But to return to the fate of the Civil Law in the time of Henry VIII. It was far from being the object of that monarch to depress the study of that jurisprudence; his intention was rather to elevate it on the ruins of the Canon Law; with this view he passed an Act, conferring the privilege of holding two Benefices, with cure of souls, on those who had taken the degree of a Doctor of Civil Law; and another, that enabled Doctors of the Civil Law to marry, and nevertheless to hold judicial employments of an ecclesiastical character; the construction put by the Temporal Courts upon this Statute, and its effect upon the minor Ecclesiastical Courts, has been already considered in an earlier part of this pamphlet.

Since the reigns of Stephen and Henry II., when the celebrated Vicarius first read lectures at Oxford on the Civil Law, the Universities have made it their legitimate boast that the study of our profession found its shelter and encouragement within their *pomœria*. The history of almost every college will show that the promotion of this study was an object which its founder had at heart. The statutes promulgated after the Reformation, during the royal visitations of the Tudors, as has already been shown, most carefully provided for the furtherance of the same end.

The statutes of Edward VI. define more closely the knowledge requisite for a Doctor of Civil Law, and set forth the usefulness of such knowledge to Church and State, as follows;—" Doctor Legum— " Doctor mox a doctoratu dabit operam legibus " Angliæ, ut non sit imperitus earum legum quas " habet sua patria, et *differentiam exteri patriique* " *juris* noscat, et in solennibus comitialibus quæs- " tionibus unus qui id maximè certissimèque " sciat facere ad finem quæstionum *quid in illis jus* " *civile, quid ecclesiasticum,* quid regni Angliæ jus " teneat, defineat, determinetque." *

And here I cannot wholly pass by a circumstance strongly illustrating the value always attached to the Civilians by the Universities, and demonstrating how intimately they deemed the interests of our profession to be identified with their own welfare. In 1603-4, it was represented to the authorities at Oxford that " the " Civilians had much ado to preserve their con- " tinuance in the realm; and on their frequent " complaints hereof to the University for its aid " and assistance in this matter, the Vice-Chan- " cellor, in a full convocation, signified the dan- " gerous consequence of losing this study, to the

* These statutes are copied from Dr. Lamb's book, but they are *mutatis mutandis* the same as those given to Oxford, save that Oxford has some *post-statuta*, which Cambridge has not.—Twyne's Collect. vol. iv. p. 144, in Turr. Schol. Oxon.; Lamb's Documents from MS. Library, C. C. C. C., p. 127; see also a similar statute of Elizabeth's, *323.*

"doctors and masters, by adding, that if one of "the four principal pillars, whereon this Univer- "sity was founded, should be taken away, the "whole fabric thereof must in time necessarily "fall to ruin. And after Dr. Martin of New "College had in a speech showed what mischief "would accrue to the nation by the extirpation "thereof, it was unanimously agreed to implore "the assistance of the Chancellor, and the Earl "of Devonshire (then a court-minion) in this "affair; and on letters transmitted by the Uni- "versity to these great men, all our fears vanished, "and the destructive councils of our malevolent "enemies came to nothing; yea, the study of the "Civil Law was instantly refreshed and strength- "ened with new encouragements from royal "charters under the great seal of England, im- "powering the Universities of Oxford and Cam- "bridge to chuse and send up each of them two "persons to sit and represent them in Parliament; "*by which charters we are admonished to elect such "persons as are skilful in the imperial laws;* but "how far we have departed from this wholesome "institution let the world judge." *

In truth, the Universities are doubly interested in the preservation of this study, first, because the statutes, both those of the University and of the College, must, in cases of doubt, which not unfrequently arise, receive their interpretation from

* Ayliffe's Oxford, vol. i. p. 202.

the Canon and Civil Law; the founders of Colleges (Chicheley and Wykeham, for example) were often deeply versed in both branches of jurisprudence, and in cases tried before the visitors of colleges, many of the arguments have been drawn from these sources;* but secondly, (and this is the most important point at present,) inasmuch as the degrees conferred at the Universities are the necessary passport to the College of Advocates at Doctors' Commons.

I have already touched upon the great advantages properly incident to this circumstance. It cannot be denied that these advantages have been too often neglected. The memoirs of Sir Lionel Jenkins, who died 1685, testify the labour and erudition required, during the time he acted as Deputy for the Professor of Civil Law Sir Giles Sweit,† in the candidates for degrees in Civil Law, and also the superior value which he set upon a degree conferred at our University to one granted by such an institution on the Continent. "For whereas foreign Universities, he used to "say, regarded merely the performance of some "forms of exercise, and perhaps the person or "recommendation of a man, those of England, "besides such formal performances, required a

* See especially the argument in the Winchester and in the New College case, 1839, printed by Saunders and Benning, Fleet Street.

† Life, p. x.; vol. ii, p. 653.

"certain residence and expense of time, on a "supposition that, however such forms may be "deceitfully or carelessly passed through, yet "that one who lives some considerable time "amidst the advantages and helps of knowledge "he thought could scarcely avoid improvement "in some art even by his ordinary conversation." The last century, however, saw many advantages neglected, many customs practically abrogated, of which the reason had been forgotten or condemned. We are beginning to discover in many respects, that there was more of presumption than wisdom in such conduct. There is good reason to hope that the subject of which I am treating may be among those of which the usefulness may be fully revived. Far be it from me to utter anything approaching to disrespect for that University, to which I am, and must ever be, a debtor for very many and very great advantages, and for which, independently of any private consideration, I cherish an affectionate reverence as a national institution of unspeakable value. But perhaps I may be allowed, without presumption, to suggest that for a considerable period* a due share of attention has not been given to this branch of study. How easy, and I must add how *just*, would it be to insist that all those who take degrees in Civil Law for the sake of certain advantages attached

* All who have conversed with intelligent foreigners are aware of the surprise which they express at the comparative neglect of the Civil Law at the English Universities.

to them should produce some certificate of their acquaintance with that science.*

So far the University might compel a nominal to become a real study, as well in those who do as in those who do not intend to practise in Doctors' Commons; but even where it could not compel, it might offer great inducement to this study. Not the least unfavourable change in the habits of those who resort to the Universities for education is the prevalent custom of considering an education finished which is but begun, and of consequently leaving the University as soon as they have ceased to be undergraduates; losing thereby at least one-half of the advantages which they would derive from a longer residence: among which are to be reckoned free access to excellent libraries,†—intercourse partly with contemporaries preparing for various professions, partly with persons somewhat older than themselves; the instruction to be derived from lectures on Divinity, History, Chemistry, Political Economy; and what once was, and I trust will soon again be, considered as the best intermediate discipline

* "Scholastic honours or promotions are called *degrees*, be- "cause they are given *gradations*, as *persons, by a progress of* "*learning, advance themselves thereunto;* and these degrees are "by Universities granted to scholars as the *honourable rewards* "*and badges of their studies.*"—*Ayliffe's Oxford*, vol. ii. p. 195. For example, by the terms of its foundation sixteen of the fellows of All Souls *must* take their degrees in Civil Law.—*Ayliffe's Oxford*, vol. i. p. 338.

† The late Dr. Arnold dwells with much wisdom on this point in his Lectures on History.

between classical studies and active life—the best link between reading of a more speculative kind and the practical business of the Senate, the Bar, or employment in foreign courts,—the study of the Civil Law. Hear the learned and judicious Ridley on this matter. "Of all those "goodly and excellent titles of the Civile and "Canon Law, so full of wisdome, so full of va- "riety, so well serving for every moment and "state of the commonwealth, in peace or in "warre, as nothing can be more, the professours "thereof have very little use here within this "realm,

"For first, for the Civile Law, beside the two "Universities of this land, that of Oxford and "the other of Cambridge, to whom the kings of "this realm have granted a larger libertie, in the "practise of these lawes, than to any other place "of the kingdome; *for that their purpose was, to "have young men trayned up there in a more ripe "knowledge of these professions*, that when they "came abroad, they might be more ready in "all matters of negociation and commerce that "the prince or State should have need of them "to deal in with foreign nations when they were "thereto called, to which the lawes of this land "serve nothing at all, by reason of the difference "that is between their law (which is either "wholly the Civile Law, or for the most part "grounded on it) and the law of our nation."

Blackstone speaks much to the same effect in

his introductory lecture—"Nor (says he) have "the imperial laws been totally neglected even "in the English nation. A general acquaintance "with their decisions has ever been deservedly "considered as no small accomplishment of a "gentlemen; and a fashion has prevailed, espe- "cially of late, to transport the growing hopes of "this island to foreign universities, in Switzer- "land, Germany, and Holland; which, though "infinitely inferior to our own in every other "consideration, have been looked upon as better "nurseries of the civil, or (which is nearly the "same) of their own municipal law."

And so in former days many of the nobles of our land were conversant with the rudiments of this science. Such was Lord Dorchester, to whom Zouch dedicated his treatise. Such was the celebrated Lord Chesterfield, who, in spite of his elaborate follies, was a person of great natural gifts and acquired endowments, and he studied the Imperial Law both at Cambridge and at Leyden with great assiduity.* Such was Lord Marchmont,† and such were the sons of Earl Granville, for whose instruction Taylor, in 1755, compiled his work, so richly illustrated with every kind of classical literature,‡ on the Civil Law. And

* Maty's Memoir of Lord Chesterfield, vol. i. p. 50.

† "His most favourite studies appear to have been in the Civil Law and the Laws of England and Scotland, in the records and history of the European nations, and in ancient history."—*Sir George Rose's Preface to the Marchmont Papers*, p. lii.

‡ *Vide* Preface to Dr. Taylor's Civil Law.

many, I still think, who, not meaning to make the law a profession, are deterred from entering the Inns of Court and the office of the Conveyancer or Special Pleader, would be likely to pursue a course of study which would imbue them at least with the principles of their own and of European law,* and which would at the same time blend itself, not inharmoniously, with the merely classical studies of their recent undergraduateship.

Of the five Professorships† which Henry the Eighth founded out of the spoils of the Church, one was instituted and endowed at each University for teaching the Civil Law. At Oxford, the lay prebend of Shipton was attached to the Professorship, and in Charles the Second's reign this endowment was expressly recognised and confirmed as an exception to the general law laid down in the Statute of Uniformity. The foundation of these Professorships in some measure counterbalanced the injury which the Civil Law received from the discredit into which the Canon Law had fallen.‡ But this was not, I think, the sole or the principal circumstance which kept

* "Exteri patriique juris differentiam noscat."—*Vide King Edward's Statute, ante*, p. 106.

† Divinity, Hebrew, Greek, Civil Law, Medicine, founded 1540, confirmed 1546. John Story appears to have been the first Professor at Oxford appointed with a fixed salary.—Wood, Hist. & Ant. of Oxford, vol. ii. pt. 2, pp. 840 & 859, ed. Gutch.

‡ Luther openly burnt at Wittemberg the books of the Canon Law. Robertson's Charles V., Book 2.

alive at this time the knowledge of this jurisprudence.

About this period a great and important change had begun to take place in the relations of the European communities towards each other, which rendered the preservation of the study of the civil law of great, and indeed indispensable necessity, to these islands. During the reign of the Tudors the English had been compelled, by a multitude of concurrent causes (far too many for enumeration in these pages), to abandon their hopes of permanent conquests in France; nevertheless, at this very period, Great Britain began to assume that attitude, with respect to foreign powers, which, from the days of Lord Burleigh to Mr. Canning, it has been the constant endeavour of her wisest and greatest statesmen to enable her to maintain. She became an integral part, in spite of her "salt water girdle*" of the European system, and daily more and more connecting her interest with the commonwealth of Christendom. Every fresh war and revolution on the Continent, every political and religious movement, rendering that interest more indissoluble, while her increasing prosperity enabled her to execute the wise policy of fighting the battles for her own preservation on the territory of her ally or her enemy, or on the ocean, the common highway of nations, thus happily preserving the freedom of her own

* Cymbeline, Act 3, Scene 1.

soil from the horrors and disgrace of foreign invasion.

The closer the bond of international intercourse became, the more urgent became the necessity for some international law, to whose decisions all members of the commonwealth of Christendom might submit. The rapid advance of civilization, bringing with it an increased appreciation of the blessings of peace, and a desire to mitigate even the necessary miseries of war, contributed to make this necessity more sensibly felt. A race of men sprung up whose noble profession it became to apply the laws of natural justice to nations, and to enforce the sanction of individual morality upon communities. But the application of these laws and sanctions to independent states, and still more any approach towards securing obedience to them, was no easy achievement; no one nation, it was obvious, had any right to expect another to submit to the private regulations of her municipal code; and yet, according to the just and luminous observation of Sir James Mackintosh, "In proportion as they approached "to the condition of provinces of the same em- "pire, it became almost as essential that Europe "should have a precise and comprehensive code "of the law of nations, as that each country "should have a system of municipal law."* In this state of things it was a circumstance equally fortunate and remarkable that there should be in

* Lecture on the Law of Nature and Nations, p. 13.

existence a system of law, to the wisdom and justice of which Continental Europe, at least, could make no objection. Every European nation had fully recognized both these qualities in the Roman law when she made it the basis of her own jurisprudence. "The imperial law (Hurd "remarks) being generally well received by the "princes of Europe, presently became a kind of "*jus gentium.*"* And Mr. Burke, who said all things well on mixed questions of philosophy and jurisprudence, observes, that all jurists borrowed their analogies from the Civil Law. To the same effect is the remark of the sagacious and profound Bynkershoek—"In iis quæ sola ratio com-"mendat a jure Romano ad jus gentium tuta "sit collectio."† The jurisprudence of the Digest, before it could be admitted as an umpire in the disputes of modern Europe, would, of course, be considerably modified by custom, by convention, by the usages of Christendom, by the spirit of feudal independence, by the peculiar character which chivalry had impressed upon the minds of men; in fact, by the various elements of thought, habit and action, which distinguished the sixteenth from the sixth century. Still it had for centuries commanded the veneration of mankind, whose natural rights it had investigated with impartiality and explained with precision. It was

* Vol. ii. p. 183, of Dialogues Moral and Political.

† Quæstiones Juris Publici, c. iii.

richly stored with comprehensive principles of written reason, of the science and philosophy of law. It was the collected experience of an empire which had included under its dominion the whole civilised world, and it was further recommended at the epoch of the revival of classical literature, by the clearness of its style and the beauty of its language.

Accordingly, from Grotius to Lord Stowell,* it became the basis of all the great labours of jurists. References to it abound in the works of all those writers who have sought to reduce the law of nations to a system. No one can read a page of Grotius† or Bynkershoek without perceiving that in their language, their reasoning, and their illustration, they take for granted in their readers an acquaintance with the elements at least of the Civil Law.

It was, as has been said, soon after the era of the Reformation that the science of international law began to flourish on the continent; and it

* Wiseman, Excellency of the Civil Law, p. 110. "And, moreover, by as it were a general consent of nations, there is an appealing to, and vesting in, the voice and judgment of the *Civil Law* in these cases between nation and nation, &c." See Lord Stowell's remarks in "The Maria Paulsen," 1 Rob. 30. See Facciolati Orationes, p. 127, Patavii, 1723, 8vo. "Fidenter affirmatèque oportere constituo gentes omnes Romanis legibus operam dare, sed suis vivere," &c.

† Take, as one instance out of many, his chapter xvii. on that most important subject—"de damno per injuriam dato et obligatione qua inde oritur."

has been said that this epoch was on the whole unfriendly to its study in this island, it remains to show by what means any vestiges of it have been preserved; and how a profession, whose duty it was to be "lawyers beyond seas,"* was maintained in these islands, where honour and emolument have ever, with few exceptions, attended the knowledge and practice of a distinct and isolated system of municipal law.

Long before the Reformation there existed an ancient Society of Professors and Advocates, not a corporate body, but voluntarily associated for the practice of the Civil and Canon Law. In 1587, Dr. Henry Hervey, Master of Trinity Hall, in the University of Cambridge, purchased from the Dean and Chapter of St. Paul's, for the purpose of providing a fixed place of habitation for this society, an old tenement, called Mountjoy House, on the site of which the College of Advocates, at Doctors' Commons, now stands. In this sequestered place the study and practice of laws proscribed from Westminster Hall, took root and flourished.

The Tudors, who, with all their faults, were unquestionably the most accomplished and lettered race which has yet sat upon the English throne, always looked with a favourable eye upon Civilians, employed them in high offices of state, and set especial value on their services in all negotiations with foreign countries. Few if any matters

* Ayliffe's Parergon Juris Canonici, Introd.

of embassy or treaty were concluded without the advice and sanction of some person versed in the Civil Law. The enmity of Henry VIII. to the Canon, as has been observed, materially injured the profession of the Civil Law; but this was a result neither contemplated nor desired by that monarch: he founded, as has been said, a professorship of Civil Law at both Universities, and in many respects befriended the maintenance and culture of this science. True it is that both he and his predecessor found many of the instruments of their oppression among this order, but in what order did they not find them? and what reasonable person entertains a prejudice against the tribunals of Westminster because they were once disgraced by a Scroggs and a Jeffries? In 1587 Albericus Gentilis,* an illustrious foreigner, was appointed to the Professorship of Civil Law at Oxford; his work, *De Jure Belli,* was in truth the forerunner of Grotius; according to the emphatic language of the learned Fulbeck, he it was "who by his great industrie hath quickened the "dead body of the civil law written by ancient "civilians, and hath in his learned labours ex-"pressed the judgment of a great state, with the "soundnesse of a deep phylosopher, and the skill "of a cunning civilian. Learning in him hath

* He came from the University of Perugia: died 1609.—Wood's Hist. and Antiq. of Oxford, ed. Gutch, vol. 2, pt. 2, p. 858.

" showed all her force, and he is therefore admi-
" rable because he is absolute."*

During the earlier period of the Tudor sway, ecclesiastics, many of them of high renown, were advocates of the civil law, but towards the close of Elizabeth's reign the profession became, and has ever since been, composed entirely of lay members.† During this reign a nice question of international law was raised in the case of the Bishop of Ross, ambassador to Mary Queen of Scots, and Elizabeth submitted to Drurye, Lewes, Dale, Aubrey, and Johnes, advocates in Doctors' Commons, that most difficult and important question as to the propriety and lawfulness of punishing an ambassador for exciting rebellion in the kingdom to which he was sent. Civilians were also consulted as to the power of trying‡ the unhappy Mary herself, and Mr. Hallam seizes on the facts, with his usual sagacity, to demonstrate that the science of international law was even at this period cultivated by a distinct class of lawyers in this kingdom. James I., who besides his classical attainments, imbibed a strong regard

* A Direction or Preparative to the Study of the Law, f. 266, Lond. 1620, 8vo. Irving's Introd. to the Civil Law, s. 97.

† An unsuccessful attempt was made in Highmore's case (8 East's Reports, 213) to obtain a mandamus from the archbishop commanding the Dean of the Arches to admit Dr. Highmore a member of the College of Advocates. This was in 1807.

‡ Constitutional History, vol. i. pp. 218, 219; Strype, 360—362.

for the Civil Law from his native country, protected its advocates to the utmost that his feeble aid would extend.* To this monarch Sir Thomas Ridley dedicated his "View of the Civil and Ecclesiastical Law," a work of very considerable merit and of great learning; it had for its object to demonstrate the pettiness and unreasonableness of the jealousy with which the common lawyers had then begun to regard the civilians, and the law which they administered at Doctors' Commons—and it appears to have been by no means unattended with success. For it was probably in consequence of this able work that about the year 1604 each of the two Universities was empowered by royal Charters to choose two members to represent them in Parliament, and by the same charters they were admonished to select such as "were skilful in the Imperial Laws."†

The reign of the first Charles produced two civilians of great eminence, whose reputation, especially that of the latter, was as great on the continent as in these islands—Arthur Ducke and Richard Zouche. The former steadily adhered to

* Cowell, who was Professor of Civil Law at Cambridge, had acquired a profound knowledge of this law, and had in consequence been chosen Master of Trinity Hall, (an office at this moment filled by the learned Judge of the Arches,) published a dictionary of law, in imitation of Calvin's Lexicon Juridicum, a work of much learning, but containing extravagant dicta about the king's prerogative. James shielded him from the wrath of Coke.

† Vide infra, Appendix, p. 160.

the fortunes of his unhappy sovereign; and his work, " De Usu ac Authoritate Juris Civilis," has never ceased to maintain its deserved authority. Zouche, who held several high appointments, submitted to the authority of the Parliament.* In 1653, the famous case of the Portuguese ambassador happened: Don Pantaleon da Sa, having deliberately murdered an English subject in London, took refuge in the house of his brother the Portuguese ambassador. That high functionary insisted on the exemption of his brother from punishment on account of the inviolable character which the law of nations impressed upon the dwelling of an ambassador. Cromwell, however, caused him to be tried before a commission composed of Sir H. Blunt, Zouche, Clerk and Turner, Advocates of Civil Law, and others; before whom he was convicted of murder and riot, and for these offences was executed at Tyburn. On this occasion Zouche wrote a very able and learned treatise entitled " A Dissertation concerning the " Punishment of Ambassadors who transgress the " Laws of the Countries where they reside, &c." This civilian was also the author of several other treatises on public law, the most celebrated of

* Zouche had received a patent from King James, assigning to him a stipend of 40*l.* per annum, and all emoluments and privileges enjoyed by " Albericus Gentilis, Frauncis James, and John Budden." This patent is to be found in Rymer's " Fœdera," and is printed at length in the Appendix to this pamphlet.

which was entitled "Juris *inter Gentes* Questiones," a book which is to this day of high authority and constant reference by all jurists both in Europe and America.

During the reign of Charles II. various causes conspired to extend and strengthen the influence of our profession. The restoration of the orders and discipline of the Church—the rapid growth of commerce and its consequences, augmentation of *personal* property, and increase of shipping—the creation of a navy board,* and widely spreading relations with foreign states—the two Dutch wars, and the personal merits of the great Civilian of the day, Sir Leoline Jenkins—all contributed to produce this result.

"If," says Sir Robert Wiseman, Advocate-General, writing in 1680, "we look no farther "back than twenty years ago, we shall remember "the Civil Law did so far spread itself up and "down this nation, that there was not any one "county which had not some part of the govern-"ment thereof managed and exercised by one or "more of that profession, besides the great em-"ployment and practice it had in the Courts in "London. So that it being thus incorporated, "and, as I may say, naturalized by ourselves "into this commonwealth, it ought not to be "reputed or looked upon by us as a stranger any "longer." The extract is taken from a treatise

* Vide Pepys' Memoirs, *passim*.

called the " Law of Laws, or the Excellency of " the Civil Law;" as it is the last formal plea put forth in behalf of our profession, I may be excused for continuing this extract, which seems to me not without considerable merit as a composition:—

" Besides, right reason, from what hand soever " it comes presented, ought to be embraced by " us; and is authority enough to itself to carry " the understanding, judgment, will and affec- " tions of all men, though it be not put into a law. " But when besides its own commanding power " and virtue, it comes withal recommended by " such a wise state as the Roman was, and framed " into a law by them, and has since been allowed " of by other nations also, as conforming with " the general reason of man; surely it ought not " to be looked upon as strange and foreign unto " us, or to our affairs, carrying about us the same " reason, and dealing in the same matters that " they did, merely because we did not promul- " gate and enact the same.

" Moreover, if we will deal in foreign affairs, " and launch forth into the wide ocean, and con- " verse with foreign people, and have to doe with " shipping, negotiation and traffick, without which " (so populous are we grown,) we are not able so " much as to subsist or live; or if we would be " enabled to stand upon our own defence against " a nation that shall assault us by a war; or re-

" venge unsufferable injuries done us by making
" war upon them: we must not then stand upon
" our own legislative authority, to which other
" princes and people will not be obliged; but we
" must be contented to stand and submit ourselves
" to such a law how foreign soever, as is proper
" for those very matters, and to which other na-
" tions do refer themselves; which is the Civil
" Law that nature has breathed out itself in, and
" nations have consented unto.

" *And if it be so necessary for the carrying on*
" *of foreign affairs, that they cannot be transacted*
" *without it, this shows a necessity of admitting*
" *of it also in the agitation of certain matters and*
" *causes at home and amongst ourselves, for the*
" *more ample reward and encouragement of that*
" *profession; which can never be maintained or*
" *upheld by the transaction of foreign affairs onely;*
" which is not desired neither in any greater
" latitude or measure, than has been always al-
" lowed it heretofore, and where the Common
" Law has never known to intermeddle: and in
" which if the Civil Law should not be used,
" questions and differences would arise, and there
" would be no law or rule found to settle them,
" which would be a very pernicious thing: so
" that be the authority of the Civil Law foreign,
" which it cannot be, except it were imposed
" upon us by some other nation or people; or be
" it that it were of no authority at all, but what

" the necessary assent of our own natural reason,
" and the consent of nations, gives it; yet it were
" strange that we should rather choose to have
" no law at all in those matters, than to receive
" or entertain the same for a help to direct our
" judgments in them.

" It being then so necessary a law, that but
" by the knowledge and conduct thereof foreign
" affairs cannot possibly be carried on, and there
" would be a manifest failer of justice in other
" matters at home without it; the supposed in-
" convenience of having two laws in one and the
" same nation, so much urged against it, will
" appear to be a very slender and inconsiderable
" thing; for how can that inconvenience hurt us
" more, than it does other nations, that have mu-
" nicipal laws of their own, and yet do keep the
" Civil Law too? Besides, it is so far from being
" an inconvenience, that it is both a benefit and
" an honour to a people to abound in justice, and
" to have it rather supplied by two laws, than to
" fail in the doing thereof by having but one."

I come now to the last period, that which elapsed between the Revolution of 1680 and the present time. It will be no difficult task to maintain that during this interval the profession of the Civil Law has been sustained by a succession of Advocates and Judges, who, I speak it with all reverence, may well challenge comparison with their brethren of Westminster Hall, and who

have done good service to the State, both in her domestic tribunals, in her Courts of the Law of Nations, and in her pacific intercourse with foreign nations. Nobody acquainted with the history of our country since the Revolution can be wholly ignorant of Sir Leoline Jenkins, Sir George Lee, Sir G. Hay,* Sir William Wynne, Dr. Lawrence, and Lord Stowell.

The biography of Sir Leoline Jenkins contains a history of the foreign affairs of this kingdom from the breaking out of the first Dutch war (1664) to the peace of Niméguen (1676—7), which he negociated in concert with his illustrious colleague Sir W. Temple. He filled various high offices,—those of Member of Parliament—Judge of the High Court of Admiralty—Judge of the Prerogative Court of Canterbury—Principal of Jesus College, Oxford—Ambassador—Secretary of State.

Throughout the works† of this great jurist are scattered tracts upon various questions of public and international law, rich in deep learning and sound reasoning, and consequently forming a mine from which all subsequent jurists have extracted materials of great value.‡ His acquaint-

* Vol. 2 of Walpole's Memoirs of the ten last Years of George the Second's Reign; an account of Dr. Hay's eloquence and influence in Parliament.

† I believe the Colleges of Jesus and All Souls contain MSS. yet unpublished of Sir L. Jenkins, which, it is to be hoped, will one day see the light.

‡ *Vide* Mr. Wheaton's recent work on International Law.

ance with the Civil Law was deep and accurate, as he had opportunities of evincing upon several occasions; and he often lamented, we learn from his biographer, that the Civil Law "was so little "favoured in England, where all other sciences "met with a suitable encouragement."*

"His learned decisions (I quote from the same "source†) rendered his name famous in most parts "of Europe, (there being at this time almost a "general war, and some of all nations frequently "suitors to this court,) and his answers or re- "ports of all matters referred to him, whether "from the Lords Commissioners of Prizes, Privy "Council, or other great officers of the kingdom, "were so solid and judicious as to give universal "satisfaction, and often gained the applause of "those who dissented from him, *because they* "*showed not only the soundness of his judgment in* "*the particular matters of his profession, but a*

* Life of Sir L. Jenkins, p. xi. Preface.

† Life of Sir L. Jenkins, p. xiii. and vol. ii. p. 741. He advised the Duke of York as to his title to the Seigneury of Aubigné, on the death of the Duke of Richmond; vol. ii. p. 704. He advised upon the claim of the Crown of England to the dominion of the narrow seas and the homage due to her flag; upon the Electoral Prince Palatine's settlement; on the effect of a settlement of property made by Maurice Prince of Orange; as to the succession to the personal estate of the Queen Mother of France; and on many other cases of great importance and delicacy, in which the knowledge of a civilian and publicist was required. See vol. ii. pp. 663, 673, 674, 709, &c.; see also Temple's Memoirs.

" *great compass of knowledge in the general affairs* " *of Europe, and in the ancient as well as modern* " *practice of other nations.* Upon any questions " or disputes arising beyond sea between his " majesty's subjects and those of other princes, " they often had recourse to Dr. Jenkins. Even " those who presided in the seats of foreign judi- " catures, in some cases applied to him to know " how the like points had been ruled in the Ad- " miralty here, and his sentences were often ex- " emplified and obtained as precedents there, &c." " For his opinion, whether in the Civil, Canon, " or Laws of Nations, generally passed as an " uncontrovertible authority, being always tho- " roughly considered and judiciously founded."*

The law which governs the disposition of the personal estates of intestates, commonly called the Statute of Distributions,† was framed by Sir L. Jenkins, principally upon the model of the 118th Novel of Justinian.

It was also by the influence of this distinguished member of our body, that after the Fire of London we obtained a share of certain immunities enjoyed by other branches of the bar. In p. 693 of the second volume will be found the rescript of Charles II. on the subject, beginning "Charles R. " The Society of the Doctors at Civil Law, Judges " and Advocates of our Court now settled at " Doctors' Commons, in London, having to their

* P. xviii. † 22 & 23 Car. II. c. 10.

" great charges rebuilt the same, &c. &c. And
" *we knowing the usefulness of that profession for*
" *the service of us and our kingdom in many affairs,*
" found just cause to assert their exemption from
" payment of taxes, burdens, and impositions, in
" the same manner as the Societies of the Ser-
" jeants' Inn are and have used to be."

The death of Jenkins happened soon after the accession of James II. In the reign of Anne, Sir John Cooke, a distinguished Civilian and Dean of the Arches, was one of the Commissioners for the Treaty of the Union with Scotland: and every body acquainted with the Treaty of Utrecht is aware that the civilians were continually consulted by the Crown upon the framing of the different articles contained in it. Thus the Queen, in her instructions to Lord Bolingbroke, " whom we have appointed to go to France," speaking of the exchange or alienation of Sicily by the House of Savoy, observes, " as to " the second point which you are to adjust, as far " forth as is possible, we have directed what has " been prepared by the civilians upon this subject " to be put into your hand.* The reigns of the two first Georges produced Sir George Paul,† Sir Henry Penrice, and the two Bettesworths, judges of great learning and ability; but I pass on to the date of 1729, when Sir George Lee first entered

* Bolingbroke's Correspondence, vol. i. p. 4, note.

† Walpole's Memoirs, vol. i. p. 560.

upon his career of distinction. This able Civilian was an active enemy of Sir Robert Walpole; he was also Treasurer to Frederick Prince of Wales, and deservedly venerated for the learning, accuracy and clearness of his decisions in the Prerogative and Arches Courts, in both of which tribunals he presided as Judge. But he enjoys also no inconsiderable European fame; for he was the principal composer of a state paper* on a great question of international law,—the answer to the memorial of the King of Prussia, presented to the Duke of Newcastle by Mr. Mitchell, and, to borrow the words of his biographer,† "it has "universally been received and acknowledged "throughout Europe as a correct and masterly "exposition of the nature and extent of the ju- "risdiction exercised over the ships and cargoes "of neutral powers by Courts of the Law of "Nations, established within the territories of "belligerent states. Montesquieu characterises "it as *réponse sans replique*, and Vattel terms it "*un excellent morceau du droit des gens.*" To that memorial indeed another name was affixed, the name of one who was not indeed a member of the College of Advocates, but who was destined to be among the few luminaries of jurisprudence in our

* It is printed in the Collectanea Juridica.

† See Dr. Phillimore's Preface to Sir G. Lee's Reports, p. xvi. See also an elaborate panegyric by Dr. Harris, in the Preface to his translation of the Institutes of Justinian.

island, and able to vie with those which have shone upon the Continent,—of one whose boast it was that he had early and late studied the Civil Law, and who built upon this avowed basis, and on his knowledge of the writers on public law, that goodly fabric of commercial jurisprudence, which has since indeed received addition and ornament, but which owed its existence to a mind saturated with the principles of the Justinian Code. This great man was then Mr. Murray, afterwards Lord Mansfield. For comprehensive grasp of mind, for knowledge of general principles of law, and of their particular application in various countries, this illustrious magistrate was second only to one—with the mention of whom I shall presently close my brief notice of distinguished Civilians.*

But, to be historically correct, I should first advert to a circumstance of great importance in its relation to the history of the Advocates of Civil Law, and to the scope of my object in showing the *injustice* as well as impolicy of destroying their College. Sir G. Lee died in 1756; in 1768 George III. granted to this Society a formal charter, by which it became a legally recognised body corporate. The charter is given at length in the Appendix. The charter recites, that the members of the College at Doctors' Commons had devoted

* Want of space compels me reluctantly to omit all mention of such judges as Sir E. Simpson and Sir G. Hay.

themselves to the study of the Civil and Canon Law, and were either advocates or judges in the Ecclesiastical and Admiralty Courts, and that they had for " centuries past formed a *voluntary* " society," &c., and prayed the king to be pleased, by letters patent under the great seal, " to incor- " porate them and their successors by the name, " style, and title of the College of Doctors of " Law, exercent in our Ecclesiastical and Admi- " ralty Courts." The charter goes on to say— " We having taken the said petition into our " royal consideration, and being willing to give " all fitting encouragement to the said study," &c., and then proceeds to constitute, with every imaginable formality of expression, the College a legal corporate society, with visitors and power of making bye-laws, &c. And here I might inquire perhaps into the *justice*, as well as the *policy*, of destroying this charter. I return to the mention of that Civilian whose reputation as a jurist over-topped even the great name of Lord Mansfield. In 1779 Dr. Scott enrolled his name among the advocates of Doctors' Commons; he is now better known by his well-deserved title, as Lord Stowell, of whom it may be indeed emphatically said, that he left

" Clarum et venerabile nomen
" *Gentibus.*"

And the remainder of the line is scarcely less his due:

" Et multum nostræ quod profuit urbi."

The history of Lord Stowell is familiar to the present generation. His great natural endowments—his long residence at the University—the admirable use he made of the opportunities which such residence affords for storing the mind with all kinds of knowledge—his vast and varied intellectual attainments—the mature age at which they were brought into the fray of active life—the keen insight into human nature—the judicial character of his wise, patient, and deliberative mind—the marvellous power of lucid arrangement, educing order and harmony from the most perplexed and discordant matter—the clear and beautiful robe of felicitous language and inimitable style which clothed all these high attributes—the awful crisis and convulsion of the civilized world which called for the exercise of these powers in the judgment-seat of international law,* at the very time when he was elevated to it; the renown of his decisions over both hemispheres†—the great age to which he enjoyed the full possession of his faculties—all this is matter of too recent history to require a more detailed enumeration. "Testes vero jam "omnes oræ atque omnes exteræ gentes ac "nationes: denique maria omnia tum universa,

* Every reader of Burke will remember his remarks, in the Letters on a Regicide Peace, on the violation of the precedents and principles of the Law of Nations by Revolutionary France. See also Sir J. Mackintosh's Law of Nature and Nations.

† *Vide passim* the American Reports.

" tum in singulis oris omnes sinus atque portus."* With this justly venerated name I close my catalogue of English Civilians, omitting, not without regret, all mention of Dr. Harris, a Civilian of very great eminence, of that learned and most able judge, Sir William Wynne, and of Dr. Lawrence, the well-known friend of Burke. To the latter, indeed, ample justice has been done by Lord Brougham, in his Characters of British Statesmen.†

Advantage of the Rules relating to the Admission and Practice of Advocates at Doctors' Commons.

I have endeavoured to give a sketch of the fortunes of the Civil Law in this country, and to illustrate them by some comments on the most distinguished disciples of that jurisprudence. My sketch has been necessarily meagre and imperfect; it would otherwise have transgressed the conventional limits of a pamphlet; and I have been compelled, especially during the latter period, to pass by in silence many civilians who would have deserved commemoration in a larger work. A sufficient selection, however, has, I trust, been given, to support the proposition with which I set out, that the destruction of our profession would be an injury, and not a benefit, to the State.

* Cicero, pro Lege Manilia.

† See also Horner's Memoirs, vol. i.

Now that such a consequence would follow from the violation of our Charter, that is, from the admission of Barristers not duly qualified to practise in the Courts of Doctors' Commons, it will not be difficult to show. In the first place, this wanton and unnecessary change would strike a death-blow to the various and peculiar learning of Civilians. At present, by the rules of our Charter, a considerable period must elapse between the time when the Undergraduateship at the University ceases, and the practice of an Advocate begins—a longer period than is requisite for practice at the common law bar. Very great advantage frequently has ensued, and I think always ought to flow, from this salutary regulation. Let any one consider the career of our two most eminent jurists, Sir Leoline Jenkins* and Lord Stowell. Both had passed the age of thirty before they were immersed in the daily routine and practice of their profession. Both brought to that practice minds seasoned with the principles of jurisprudence; with a philosophical knowledge, especially the latter, of history, which is scarcely, if it be ever, compatible with early and laborious employment at the bar. Can any one read the

* "He was wont to observe, that those in any profession succeed best who neither defer their resolution too long, nor begin their practice too soon. So Dr. Jenkins, having laid a firm and solid foundation before he openly declared his profession, business and preferments came fast upon him."—*Preface to Jenkins' Life.*

reports of Lord Stowell's judgments in the ecclesiastical and maritime tribunals of this kingdom, and the Courts of the Law of Nations, and doubt that his intimate knowledge of the internal history of this country and of its intercourse with other nations—his accurate and large acquaintance with the principles of foreign codes, of their agreement or discrepancy with each other and with that of Great Britain—of the ecclesiastical, maritime and *municipal* law of England and of *Scotland**—of the different bearings and character of the treaties, and varied customs of international intercourse, which, with the general law of nations, constitute the moral ligament of the commonwealth of Christendom?—Can any one peruse with attention all these monuments of a master-mind, and doubt that they were the acquisitions of long and tranquil study, matured by patient thought and calm reflection, such as could scarcely have been accumulated under the pressure of early and extensive practice, and especially of practice in a law whose peculiar and technical character must in some respects tend to disqualify the mind for such researches? It is no answer to this observation, to say that there have been barristers who were well versed in the learning of our profession. The question, it will be

* Dalrymple *v.* Dalrymple (2 Consistory Reports, 54) is as leading a case in Scotch law as the Ville de Varsovie is on a question of evidence in Westminster Hall. 2 Dodson, 184.

recollected, is as to the *general* tendency of the exclusive study and early practice of our municipal law. Hear, again, the language of Lord Stowell, administering justice in the Prize Court: "It is to be recollected that this is a Court of the "Law of Nations, though sitting here under the "authority of the King of Great Britain. It belongs "to other nations as well as to our own; and what "foreigners have a right to demand from it is, "the administration of the *Law of Nations* simply, "and *exclusively of the introduction of principles* "*borrowed from our own municipal jurisprudence,* "*to which it is well known they have at all times* "*expressed no inconsiderable reluctance.*" *

Every candid person will allow that the exceptions† are rare to the general rule, that the common lawyers of England are, as a body, scarcely tinctured with the knowledge of the general law of Europe: "Il me semble" (says a learned Frenchman)‡ "que les Anglais com-"mencent à revenir de leurs anciens préjugés "contre le Droit Romain; mais il est encore "bien difficile de trouver un exemplaire du "*Corpus Juris* dans la Bibliothèque d'un avocat "de Londres." Acting upon this belief, a distinguished Prussian jurist, in a recent visit to

* The Recovery. 6 Dodson's Admiralty Reports, 349.

† I am not afraid of being charged with partiality for referring to Mr. Phillimore's recent work as a very brilliant exception.

‡ Dr. Jourdan—Thémis, ou Bibliothèque de Jurisconsulte, tom. vii. p. 27.

this country, brought a *Corpus Juris Civilis* in his portmanteau.

It is to be hoped that the recent very liberal foundation of Civil Law Lectures by the Middle Temple Inn may induce a better order of things; but of course the knowledge of the Civil Law must, generally speaking, be connected with its practice.

Opinions of eminent Persons as to the Value of the Profession.

On the great advantage of preserving and fostering this knowledge in our country, where the tide of wealth, emolument, and distinction sets the other way, I have high, and certainly unprejudiced, authorities to cite. First let me quote that of Lord Campbell. The fact that this noble and learned person enjoys the unquestioned reputation of being master of that municipal law, by the assiduous and able cultivation of which he has risen to high eminence in the State, stamps, as it seems to me, a peculiar value upon his testimony in favour of the profession of Civilians. In 1830, Lord (then Mr.) Campbell, stated in his examination before the Commissioners appointed to inquire into the jurisdiction and practice of the Ecclesiastical Courts: "I have the "most sincere respect for the Civilians as a body, "*and I should think that any alteration of the law* "*that would not preserve the learning which is now*

" *to be found among the Civilians would be very* " *objectionable.* I think that, in a national point " of view, it is of importance that the King's " government should have an opportunity of con- " sulting such a man as Dr. Jenner* on Inter- " national Law, and I say that any change of " institutions which would prevent the govern- " ment from having such assistance would be " very objectionable."† These observations would perhaps apply principally to the assistance which the Foreign Office derives from the Queen's Advocate; and most assuredly their force is not weakened by the reflection, that the greater part of our numerous colonial dependencies, being conquests from the Dutch, the Spanish and the French, are governed by the Civil Law; while, even in deciding questions arising out of the law and customs of Hindostan, reference has been made by learned judges to the analogies‡ furnished by the Roman and European law.

Now let me invite attention to the language of the present Lord Chief Baron, when Attorney-General; and his evidence is not the less valuable because he was a political opponent of the last Common Law authority, Lord Campbell:— " With respect to the Law Society, he could

* Sir Herbert Jenner, then Queen's Advocate, the present Judge of the Prerogative Court of Canterbury.

† Report of Ecclesiastical Commissioners, p. 228.

‡ Sootragun Satputty *v.* Sabitra Dye, 2 Knapp's Privy Council Reports, Lord Wynford; a case on the law of Hindoo adoption.

" only say, that if it was the object of that " Society to abolish the administration of the " law in Doctors' Commons and to substitute " a Court of Equity, he thought that a greater " injury could not be inflicted upon the due ad- " ministration of that branch of law than would " be inflicted by the adoption of that step."*

If the opinion of eminent lawyers be so strong (and we have yet the most important to cite) in favour of our profession, still stronger would be that, I am sure, of statesmen who have been practically conversant with the administration of government. I can refer with confidence to the Chancellor of the Exchequer, who well knows the advantage of the present system at Doctors' Commons with respect to the collection of that large branch of the revenue, the probate and legacy duties,—to those persons who are connected with the Colonial Office, the Board of Trade, and, above all, with the Foreign Office. In the Appendix will be found the opinion at length of a gentleman who filled the office of Under Secretary for Foreign Affairs during twelve years, about six of which were in the time of peace and six in the time of war. No language, it will be seen, can be stronger than that in which he describes the importance of the office of Queen's Advocate to the Secretary for Foreign Affairs; he calls it " absolutely indispensable."

* Hansard's Parliamentary Reports, vol. lxviii. p. 1047.

I have one more individual testimony to produce, and it is not too much to say that it is one to which every body competent to form an opinion upon the subject will yield the greatest respect and reverence. It is the testimony of the late Lord Chief Justice Tindal, and it is so important that I place it here *in extenso*:*—

" 1388. Do any other reasons occur to you " against the policy or propriety of the alteration " above referred to?—There are certainly other " grounds upon which I should object to that " which would appear to me to be in effect the " destruction of the Prerogative Court, of a na- " ture very different from those to which I have " hitherto adverted. I think it is of the utmost " importance to this country to have the Civil " Law well understood in this country, both as a " science and in practice. In time of war the " law of prize, the rights of neutral and co-belli- " gerent nations, every thing that touches the " relation between England and foreign countries, " is governed and conducted on the principles " not of the Municipal but of the Civil Law. In " time of peace the interpretation of treaties and " the formation of new ones, and all that arises " from the relations of different nations in peace " and amity, is governed by the same principle. " A constant succession of gentlemen well versed

* Evidence of the Right Honourable Sir N. C. Tindal, 28th June, 1833.

" in the knowledge and practice of the Civil Law " is therefore indispensable, in order that those " offices may be properly filled from which the " Government have the right to expect the high " services to which I have adverted. Now the " profits to be made in the Prerogative Court " from testamentary causes is, in time of peace, " the principal source from which the emoluments " of the Bar are to be derived; and upon this " account any change which would have the effect " of destroying, or in any considerable degree " diminishing, the support and maintenance of " that Bar, I consider as highly detrimental to the " public.

" 1389. If the removal of the testamentary " business from that Court should cause the " annihilation of the Bar at Doctors' Commons, " you think that would be most injurious to the " public?—Most decidedly so."

The learned Lord Chief Justice here refers to the services rendered to the State by Sir Leoline Jenkins and Sir George Lee, and continues—

" At a still later period, Sir William Scott, by " his able and luminous decisions, may be said to " have settled the prize law throughout Europe " in times of new and unexampled difficulty. " But if the regular and ordinary emoluments of " the Courts at Doctors' Commons had been " withdrawn, it is not too much to say that those " men would not have been found when they

" were most wanted; and I think the same con-
" sequences will follow, if they are withdrawn
" now; for it cannot be expected that men of
" ability and talent will give up their youth to a
" very dry and obscure study, except in the hope
" of reaping an honourable independence, and
" rising to eminence in their profession. I do
" therefore think, that, unless a much stronger
" case can be made out for an alteration, which
" will in effect occasion the destruction of the
" Bar of Doctors' Commons, it will be much
" better that such alteration shall not take place;
" for I think the knowledge and practice of the
" Civil Law in this country would fail, if the just
" emoluments due to the Bar of the Civil Law
" Courts were to be taken away.

" 1390. Does it appear to your Lordship that a
" nation such as this, having a great number of
" colonies, the foundation of whose law is the
" Civil Law, has a peculiar interest in maintaining
" a Bar of Civilians?—I think more so than any
" other country in the world.

" 1391. Considering also the probability of
" many questions arising with neutrals in time of
" war, is it not important we should have a body
" of men conversant with those subjects?—Un-
" doubtedly.

" 1392. Is it your Lordship's opinion that an
" exclusive or separate Bar leads to a better know-
" ledge of the civil law, than if the practice in the

" different courts were to be combined together?
" —I think an exclusive Bar, confining itself to
" a single branch of the law, is much more likely
" to attain eminence in that branch, than if it
" combined the study and practice of the law
" carried on in the different courts of this king-
" dom.

" 1393. Does your Lordship think it is suffi-
" cient that this country should rely on the casual
" direction of the studies of other men to this
" branch of the law?—I think it would be too
" great risk that the country should expect to
" find persons fitted for these important services
" precisely at the moment when they were
" wanted; I do not say that particular circum-
" stances might not call individuals into action
" who were never versed in the study or practice
" of the Civil Law; but it would be trusting to
" chance to expect such assistance upon such an
" emergency.

" 1394. Your Lordship is aware of the measure
" now in progress through Parliament, giving a
" new and extended jurisdiction to the Court of
" Privy Council, and a new judicial character,
" composed of the principal Judges, or those who
" have been the principal Judges?—I am.

" 1395. Is your Lordship of opinion that the
" practice before that tribunal would lead to the
" dedication of time, on the part of the practition-
" ers at that Bar, to those particular studies?—

" Undoubtedly, it would have a great tendency " to promote the study of the Civil Law; but I " think it could never supply the want of a regu- " lar Civil Law Bar. It is to be recollected that " the Civil Law is, generally speaking, the foun- " dation of the Law of the various nations of " Europe; it will therefore be difficult, if not im- " possible, that the Civil Law Bar of this country " could equal those of the continental states, if " the lawyers of this country were no longer to " confine themselves to that study alone.

" 1396. Though this appellate jurisdiction " might diminish the risk, still your Lordship is " of opinion the risk would be too great to be " wisely incurred?—It would undoubtedly dimi- " nish the risk, but I do not think there would be " men so learned in that law as we are likely to " have now.

" 1397. Your Lordship has said that, as be- " tween an exclusive and separate Bar, you would " prefer an exclusive Bar?—For the purpose to " which I have adverted, I should prefer the Bar " in Doctors' Commons to be constituted as it is " at present. The advocates are more perfect in " the study and knowledge of the Civil Law than " if they had combined with it the practice of our " Common Law Courts.

" 1398. Is there not an evil in an exclusive " Bar, in its restricting the selection of advocates " in any case of considerable importance?—That

" certainly is an incidental evil, but on the other " hand there is a fund of knowledge upon mat- " ters connected with the Civil Law in the per- " sons practising at that Bar, which a practice not " confined to that Bar would never produce.

" 1399. You think their knowledge would be " built upon a more solid foundation?—Yes, I " think so."

With the evidence of this great, learned and wise Judge, I close my references to the testimony of *individuals* in favour of our profession. But I cannot refrain from mentioning, that, before his valuable and innocent life was ended, a most singular illustration of the judicial wisdom of the opinion which has been just cited was furnished by an incident in a trial which will be always memorable in the annals of our legal history—the trial of the Queen *v.* Serva and others.*

In this most important case, a question of public and International Law was raised, which might have permanently disturbed the pacific relations of the Old and the New World, if not of the different members of the European Communities with each other. It is sufficient, however, for my present purpose that it was a question which deeply concerned the national honour and the lives of several persons. The case was argued at the Summer Assizes at Exeter, by a Queen's Counsel specially sent down there by the Admiralty. It

* 1 Denison's Crown Cases Reserved, 131.

was elaborately argued again in London before all the Common Law Judges (except two) by eminent Common Law Counsel. What was the result?—That the Judges unanimously expressed a wish to hear the case argued by *Civilians alone*, —that it was so argued,—and that the consequence was the reversal of the sentence given at Exeter, and the judicial acknowledgment by this country of a great principle of International Law, which would have been otherwise violated.

There yet remains the opinion of the Commission of 1832, so often alluded to, both in the foregoing pages and, strange to say, by the adversaries of the cause which I have sought to defend. They cannot refuse the sentence of their own tribunal, which is summed up in the following unequivocal language:

"The Advocates and Proctors of the Court of "Arches are entitled to practise in the other "Ecclesiastical Courts; and in the High Court "of Admiralty, upon being admitted by the "judge thereof. This connection between the "Ecclesiastical and Admiralty Jurisdictions has "long subsisted, and probably owes its origin to "the similarity of the form of proceedings in both "Courts, and of the course of study necessary to "qualify the practitioners for the proper dis-"charge of the duties entrusted to them. The "study of the Ecclesiastical Law requires an "accurate acquaintance with the principles of the

" Civil Law, upon which the Law of the Admi-
" ralty is founded; and the civilian is led to the
" investigation of those principles of general juris-
" prudence by which the intercourse of nations is
" governed, and the rights and obligations of
" belligerents and neutrals in time of war are
" defined. In this point of view, the mainte-
" nance of these two branches of the profession,
" in connexion with each other, has been always
" considered an object of importance; and as the
" ecclesiastical business is that alone upon which,
" in time of peace, the practitioners must depend,
" it is humbly submitted, that the alterations
" proposed to be made in the practice and con-
" stitution of those Courts, should be considered
" with reference to this object; so that the gene-
" ral character of their proceedings may be pre-
" served, whilst their efficiency, for the purposes
" for which they are designed, may be improved
" and increased by the amendments which it may
" be deemed expedient to apply to them."*

Conclusion.

Et jam tempus equûm fumantia solvere colla —and indeed I sincerely regret the length to which my observations have extended, while I feel that much, very much, yet remains unsaid. Enough however, I humbly trust, has been said, to demonstrate the flagrant injustice of the at-

* Page 65 of Report.

tacks made upon the Courts of Civil and Ecclesiastical Law, and the injury which would accrue from their demolition, both privately to the individual suitor, and publicly to the Church, the State, and the Universities. Some service too, let me hope, may have been done, by showing that the whole subject is fraught with important and complicated relations to various matters, with which at first sight it may appear to have no connection. Because this is not an inference which would naturally be deduced from the flippant self-complacency with which many aperson, possessing one half the ability and knowledge of Mr. Bouverie, passes judgment upon this difficult question.

I am of course prepared to hear my *arguments* derided, and ascribed to the bias of a personal interest in the cause for which I have pleaded, but I have stated *facts*, with regard to these Courts, and those to which it is proposed to transfer their jurisdiction; and, until these facts be refuted, I maintain that the charges which have been so frequently made, and, because uncontroverted, too often believed, against the profession to which I have the honour to belong, are *proved* to be grossly inaccurate and substantially untrue. Moreover, I have fortified my statements by a reference to authorities, which, while they help to illustrate the truth, would afford some apology even for error. My position is, that our Courts may and do challenge the most search-

ing comparison that can be instituted between them and the Courts of Common Law and Equity.

I have not denied that there are defects to be amended in the Courts of Civil and Ecclesiastical Law, but I say with confidence, that many more in number, and more injurious in kind, may be pointed out in the tribunals which it is proposed to substitute for them. The reforming zeal which sees clearly to pick out the mote and leaves the beam untouched, seems to me of a very questionable character, remarkable neither for its wisdom nor its justice. But I am no enemy to a true reform; on the contrary, it is the object of my sincere wishes. The man who effected the largest measure of practical reform ever achieved by individual exertion; and who conceived a patient investigation into and an accurate acquaintance with the history, nature and various bearings of his subject to be the necessary basis of his great labour—the statesman to whose prophetic wisdom the events of our own times, as well as those of our fathers, bear continual testimony, uttered a sentence upon which I have often pondered, "The disposition to pre-"serve," he said, "and the ability to improve, "taken together, should be my standard of a "statesman; every thing else is vulgar in the "conception, and perilous in the execution."*

* Burke on the French Revolution.

to the popular opinion: my opinion is, that *vivâ voce* examination is the very worst method; that the examination in the Court of Chancery is defective in an inferior degree, and that the examination in the Ecclesiastical Court is the most perfect; speaking of my own experience upon that subject, I think that in *vivâ voce* examination it is not the question what is the truth, but how much of the truth shall be allowed to be elicited; it is a question who is to be the examiner, and what will be the state of the nerves of the individual who is to be examined. Then the examiner is not a person, as in the Ecclesiastical Court, who has no interest on the one side or the other; but it is a part of the duty of a person having a witness under examination, to make out the proposition for which his client contends, and it is the duty of the opposite counsel to endeavour to prevent that proposition from being established; he is to interpose between the justice of the case and the interest of his client; and then the question with the practitioner is not whether he could prove a clear fact by a credible witness, but whether that witness has nerves to bear the examination, which will be necessary to prove that fact; and if he has any fear that the witness should fail from his nervous temperament, or from the superior tact of the individual into whose hands he would fall for cross-examination, he would say, I will run the risk of the case of my adversary rather than submit that witness to the chance of examination. Now in the Ecclesiastical Court, the officer is not satisfied with the answer given by the witness till he convinces himself that the witness understands the object of inquiry; he obtains the whole answer upon the subject-matter, and until he is satisfied that the witness has understood it, and that he has received from the witness what he knows upon the subject, he does not leave him. In the Court of Chancery, on the other hand, a distinct question is put to the witness; and if a man, intending to evade the question, finds that by the manner in which it is put, he can change any term in the question, so that by answering it literally he can give a negative to it, you do not get from him what he really knows, because the question has not aptly met his state of knowledge. You ask, for instance, as to a transaction which occurred at a particular place; he says to himself, no, it occurred at another place; I can therefore safely say that

it did not occur as suggested by the question; the examiner has no power to change the question; and the party is enabled actually to negative that which is true in fact, but which is not true in form.

47. Then your opinion as to a *vivâ voce* examination is, that it is rather a trial of the skill of the counsel and the nerves of the witness, than a good mode of eliciting the truth?—Yes.

48. Do you think that the process of cross-examination and re-examination is generally successful in eliciting the truth?—I think it very often succeeds; but it often happens that a violent man, with good nerve, is driven by a sort of opponent feeling to state more than he knows: he becomes a partisan in the case in consequence of the manner of examination. On the contrary, a timid man says, the more I say the more I shall be examined; I will therefore say as little as I possibly can, because I will give as little subject for cross-examination and teazing as I possibly can.

49. Do you think the interposition and interference of the Judge is sufficient protection for a witness of a timid disposition?—I should say decidedly not; and that probably arises from the disinclination of the Judge to bring himself into contact with the Counsel, and the reliance which Judges have upon what will be the effect of their subsequent summing up; and yet that, in my opinion, fails, because the reserve which belongs to the dignity of the Judge's character, will prevent his expressing himself in terms sufficiently strong to remove the impression made by the Counsel.

50. Did you ever know an instance of an honest witness being kept back from examination in the prudent management of a cause?—Many instances; I have known it done at considerable peril; I have had to tender or not to tender, in my own discretion, men of the highest honour, upon whose veracity I would have pledged my life, but have decided against their production, on account of the anxiety I have felt, as to what might be the effect of placing them in the witness box, an anxiety increased by the honour and delicate feeling of the parties; and I am satisfied that such individuals would in many cases be brought to say that they knew nothing, for fear they should assert more than they knew.

51. Is it the result of your observation, that by the mode of examination in Doctors' Commons the truth is elicited?—I think so.

52. Are not verdicts often obtained against evidence by the skill of counsel in examining?—Decidedly; I recollect a case which had proceeded for some time in the Ecclesiastical Court. The civilians gave an opinion that it was a sacrifice of the money of the client to proceed further. The nature of the question enabled the party to take the opinion of a jury; a very strong case was made by the defendant; but it was a question of feeling, and the jury returned a verdict for the plaintiff, without waiting for the summing up of the Judge. I am satisfied it was the mere difference between the system of examination, as applied to a question involving an appeal to the passions.

53. Is not the number of new trials in the course of a year considerable?—Certainly.

54. Is the number of appeals in the Ecclesiastical Court considerable?—I think not, as compared with the appeals from other courts.

55. In those appeals, does it oftener happen that they arise from any doubt of the facts of the case, or of the inference to be derived from the facts?—I should say it rather involves the question of inference, the party having identified himself with a certain view of the question, and not being satisfied with the result.

56. So that as far as the facts of the case are concerned, the examination which takes place in the Ecclesiastical Court generally arrives at the truth?—I think so. One instance occurs to my own recollection upon the subject of examination. I recollect an instance in which a witness had been examined in the Ecclesiastical Court. He was afterwards submitted to examination in a court of law, and his evidence at law fell very short of the statement he had made in the Ecclesiastical Court; and I took an opportunity of examining him when it ceased to be improper to do so, because the question was decided, to ascertain how it happened that his testimony before the two tribunals differed so materially. I found he entirely adhered to the statement he had made to the examiner in the Ecclesiastical Court, and that the discrepancy had arisen from the state of

confusion to which his mind was reduced by the examination *vivâ voce.*

57. In that case, was the result different in the two Courts? —No.

58. Was it a question with respect to a will?—No; it was a case of divorce. The sentence was for the divorce. The decision was the same in both instances; but that particular instance proved to me, that truth had been obtained in one instance, and excluded in the other.

APPENDIX II.

Evidence of W. R. Hamilton, Esq.,

21st June, 1833.

1039. How long did you hold the office of Under-Secretary of State for Foreign Affairs?—From the year 1809 to the year 1822.

1040. During that period were there any occasions on which you had communication with the law officers of the Crown connected with the civil law?—We had frequently occasion to refer cases to the King's Advocate, and sometimes also to the King's Advocate and the Attorney and Solicitor-General in one and the same communication.

1041. Were those communications of an important and confidential nature?—They were always more or less confidential, but they were always of importance.

1042. Are you of opinion, from the result of those communications, that it is of the highest importance to the foreign affairs of this country that the person holding the office of King's Advocate should be a lawyer of the first eminence in his branch of the profession?—Undoubtedly so; his opinions were of the greatest use to his Majesty's Government in deciding on very important questions which affected the law of nations.

1043. A considerable portion of the time during which you were Under-Secretary was a time of peace?—From 1815 to 1822; at the same time I should say I was out of England for a year and a half of that time, in consequence of ill health.

1044. During the period of peace, when you had experience

of the business of the Foreign Office, did it frequently happen that even then there was a necessity for having recourse to the opinion of the King's Advocate?—Very frequently; not so frequently as in time of war, but still very often.

1045. From your experience, can you say that during the period of peace you consider it a matter of importance for the conduct of the Foreign Office, that there should be a means of having communication with a person versed in the law of nations, on whose opinion a Minister of State could safely rely in his negociations with other nations?—Most certainly; I should think the Secretary of State would be very often at a loss in what manner to reply to cases that come under his consideration without having a legal opinion by an individual whose professional studies and constant occupation gave him great familiarity with the practice and the law of nations.

1046. In cases where reference is made by the Secretary of State for Foreign Affairs to the King's Advocate, does it generally happen that the judgment of the Secretary of State is governed by the opinion of the King's Advocate?—With very few exceptions indeed it is always governed by that opinion, and I am not quite sure that I could name any case in which it was not so.

1047. Do questions frequently occur during peace on which it is necessary for the Secretary of State to have recourse to an Advocate such as you have described?—It is difficult to reply generally to that question; but many cases of reference to the King's Advocate have arisen out of our treaties of peace with America and other powers, and especially out of our engagement with Spain as applicable to the peculiar situation of the South American Colonies.

1048. Independently of questions arising in time of war, questions even in time of peace occur, arising out of existing treaties, in which it is important that the Secretary of State should have the opinion of an experienced advocate?—Certainly, I should say that it is absolutely indispensable.

1049. You would conceive that the situation of Secretary of State for Foreign Affairs might be very embarrassing if he had not such assistance to have recourse to?—Not only very embarrassing to himself, but very prejudicial to the public service.

1050. Do you know how other governments are supplied with the assistance which you know from your own experience is derived from the King's Advocate by the Secretary of State in this country?—I cannot positively say that I ever remember hearing elsewhere of an appointment exactly corresponding to that of King's Advocate in this country.

1051. How do you suppose that the Secretary of State in Spain or in France is enabled to meet the arguments which are suggested to the Secretary of State for Foreign Affairs in this country by the King's Advocate?—I should say that they meet them very often by acting from partial and political feelings in many cases; that they do not give fair and honest justice to foreigners in the degree in which we do; that the opinion of the King's Advocate has always been given free from fear or partiality, or anything in the shape of instruction or hint.

1052. Do you know, from your official communication with other nations, whether our conduct, in relation to these questions, is held in great estimation?—I cannot answer that question precisely, but my feeling is much in favour of its being so esteemed.

1053. Have you reason to believe that, in consequence of the opportunity of consulting with an eminent civil lawyer here, there is a greater knowledge of the law of nations in the Foreign Departments of this country than in the Foreign Departments of other countries?—That is a very delicate question; and I should be inclined to answer, that it occasions rather individual ignorance on the subject, for we are more inclined to rely on the knowledge of others.

1054. Is the result that, with the advice of the King's Advocate, you act with a fuller knowledge of the law of nations than you have found on the part of other Governments?—Most undoubtedly so: I believe we were, by the help of the King's Advocate, in all cases right: I do not recollect the Secretary of State having occasion, on the part of his Majesty's Government, to recall an opinion given under the sanction of the advice of the King's Advocate.

1055. Do you know whether in America there is any officer corresponding to the King's Advocate in this country?—No, I am not aware that there is.

1056. Did you ever hear that the American Government were ever placed in any difficulty by the want of any such officer?—I have never heard so; but I have heard from the American minister, that their lawyers have a more general legal education than ours.

APPENDIX III.

Extract from Rymer's Fœdera, vol. 9.

De Officio Legendi Jus Civile in Universitate Oxon.

Ann. D. 1620.] JAMES, by the grace of God, &c. To all to whom these presents shall come, greeting:

Knowe ye that we for diverse good causes and considerations to us at this present moving, of our especiall grace, certaine knowledge, and meer motion, have given and graunted, and by these presents for us, our heirs and successors, do give and grant, unto *Richard Zouche,* Doctor of the Civill Law, the office or roome of reading of *our Civill Law lecture in our Universitie of Oxford,* together with the yearly fee of *fortie poundes of lawful money of England,* for the reading and exerciseing of the same office of reading the same lecture, as and with all other fees, rewardes, profitts, commodities, privileges and advantages whatsoever belonging, appertayning or incident to the said office or roome, for, proceeding or otherwise due by the laudable custom and usage of our said universitie of Oxford.

To have, use, enjoy, occupie and exercise the said office or roome of reading the said *civill law lecture,* unto the said *Richard Zouche* for term of his naturall life,—and yearlie to take for the usage, occupying and exerciseing of the said office or roome of reading the said lecture in forme aforesaid, the said yearly fee of *fortie pounds* unto the said *Richard Zouche,* from the feast of the *Navivitie of Saint John Baptist* last past before the date hereof, for and during the naturall life of the said *Richard Zouche,* out of the treasure of us, our heires and successors, at the receipt of the exchequer of us, our heires and successors at Westmynster, by the handes of the treasurer and chamberlain of us, our heires and successors there for the tyme

being, at the fower usual feasts or termes of the year, by even portion during the said term, with all fees, rewards, profitts, commodities, privileges and advantages whatsoever belonging or appertayning or incident to the said office or roome of reading, for, proceeding or otherwise by any manner of wayes or means whatsoever dewe unto the said office or roome, or to the readers of the said lecture for the tyme being, by the laudable usage and custome of our said Universitie of Oxford, in as large, ample and beneficiall manner and form to all intents and purposes as *Albericus Gentilis, Frauncis James, John Budden*, or any other person or persons at any time heretofore, having, occupying, enjoying or exercising of the same office or roome of reading the said lecture, have used or enjoyed or ought to have had and enjoyed in and for the same.

Although expresse mention, &c.

In witness whereof, &c.

Witnes our self at Westminster, the two and twentieth day of September.

Per Breve de Privato Sigillo.

APPENDIX IV.

The Charter of Incorporation of the Society of Doctors exercent in the Ecclesiastical and Admiralty Courts.

GEORGE THE THIRD, by the grace of God of Great Britain, France and Ireland King, Defender of the Faith, &c., To ALL to whom these Presents shall come, greeting: WHEREAS our trusty and well-beloved George Hay, Doctor of Law, Official Principal and Dean of the Court of Arches, and Judge of the Prerogative Court of Canterbury; Sir Thomas Salusbury, Knight, Doctor of Law, Judge of our High Court of Admiralty; James Marriott, our Advocate-General; Arthur Collier, William Wall, Andrew Coltee Ducarel, Dennis Clarke, John Bettesworth, George Harris, William Macham, Peter Calvert, William Wynne, Francis Simpson, Thomas Bever, William Burrell, Claude Champion Crespigny, and William Compton, Doctors of Law of the Universities of Oxford or Cambridge, exercent in the Ecclesiastical and Admiralty Courts, inhabiting the tenement late Mountjoy House, commonly called Doctors Commons, situate in the parish of Saint Bennet, Paul's Wharf, in our City of London, have, by their Petition, humbly represented to us, that they have devoted themselves to the study of the Civil and Canon Law, and are either Judges in the Courts of His Grace the Archbishop of Canterbury, or other Ecclesiastical Courts, or of our High Court of Admiralty, or admitted, by proper authority, to practise as advocates in our above-mentioned Courts; and that the Petitioners have, for centuries past, been formed into a voluntary Society, and lived together in one place, by means of which the business of the Public has been more commodiously carried on; and that they, for the

better support of the said Society, and for securing to themselves a fixed place of residence for the future, are desirous of becoming a body corporate; they therefore most humbly prayed that we would be graciously pleased, by Letters-Patent, under our great seal of Great Britain, to incorporate them and their successors, by the name, style and title of "The College of Doctors of Law, exercent in our Ecclesiastical and Admiralty Courts," agreeably to the heads thereunto annexed most humbly submitted to us, and with such other powers, privileges, regulations, restrictions, and provisions, as to us, in our great wisdom, should seem meet: WE, having taken the said Petition into our royal consideration, and being willing to give all fitting encouragement to the said study, KNOW YE therefore, that we, of our especial grace, certain knowledge, and mere motion, HAVE granted, constituted, declared and appointed, and by these presents, for us, our heirs and successors, Do grant, constitute, declare and appoint, the said George Hay, Sir Thomas Salusbury, James Marriott, Arthur Collier, William Wall, Andrew Coltee Ducarel, Dennis Clarke, John Bettesworth, George Harris, William Macham, Peter Calvert, William Wynne, Francis Simpson, Thomas Bever, William Burrell, Claude Champion Crespigny, and William Compton, and their successors, shall be and be called one body corporate and in deed and in name by the name, style and title of "The College of Doctors of Law, exercent in the Ecclesiastical and Admiralty Courts," and them by the name of "The College of Doctors of Law, exercent in the Ecclesiastical and Admiralty Courts," we do, for the purposes aforesaid, really and fully, for us, our heirs and successors, make, erect, create, ordain, constitute, establish, confirm and declare by these Presents, to be one body corporate and politic in deed and in name for ever: AND that the said College shall consist of a President, namely, the Dean of the Arches for the time being, and of such Doctors of Law of either of the Universities of Oxford or Cambridge, who have been admitted Advocates in pursuance of the rescript of the Archbishop of Canterbury, and who have been elected Fellows of the said College in the manner hereafter mentioned; and shall by the said name and style have perpetual succession: AND they shall have and use a Common Seal, which they may be at liberty and

are hereby enabled to alter and change as they shall hereafter find occasion, which Seal shall be kept by the Treasurer, who shall attend with it, or cause it to be attended with, at all meetings, where it shall be required: And we do hereby farther grant, that the said body politic and their successors shall, by the said name and style, be enabled and rendered capable to sue and be sued, plead and be impleaded, answer and be answered unto, defend and be defended, in whatsoever Courts and places, and before any Judges or Justices or Officers of us, our heirs and successors, in all and singular actions, pleas, suits, plaints, matters and demands of what kind or quality soever they shall be, in the same manner and form and as fully and amply as any of our subjects of this our realm of Great Britain may or can do, sue or be sued, plead or be impleaded, answer or be answered unto, defend or be defended: And are hereby enabled to raise any sum or sums of money not exceeding Thirty Thousand Pounds, and empowered to purchase, hold and enjoy, in perpetuity or otherwise, for them and their successors, any books, manuscripts, goods, chattels, or any other thing whatsoever: And also to purchase, take, hold, and enjoy, in perpetuity or otherwise, any lands, tenements, or hereditaments whatsoever, not exceeding the yearly value of One Thousand Pounds in the whole, to them and their successors, without incurring any of the penalties or forfeitures of the Statutes of Mortmain, or of any of them: And that it shall and may be lawful for any body or bodies corporate, person or persons, to give, grant, bargain, demise, sell or convey any lands, tenements or hereditaments whatsoever, not exceeding the said value of One Thousand Pounds a year in the whole, to the said College, for the use and benefit of the said College and their successors, without licence of alienation in mortmain, and that it shall and may be lawful for them and their successors to alien or raise money upon all or any part of their estates at their pleasure: And the said College shall govern themselves and all their proceedings and business according to the Statutes, Rules, Orders and By-Laws to be made as hereinafter is mentioned: And that our royal intention may take the better effect for the good government and regulation of the said College, we have nominated, and do hereby nominate, constitute and appoint the said Doctor George Hay, Official Prin-

cipal and Dean of the Court of Arches, and Judge of the Prerogative Court of Canterbury, to be the first and modern President of the said College: AND WE do hereby farther nominate and appoint the said Sir Thomas Salusbury, James Marriott, Arthur Collier, William Wall, Andrew Coltee Ducarel, Dennis Clarke, John Bettesworth, George Harris, William Macham, Peter Calvert, William Wynne, Francis Simpson, Thomas Bever, William Burrell, Claude Champion Crespigny, and William Compton, to be, together with the said President, the first and modern Members or Fellows of the said College: AND it is our royal will and pleasure that no person shall be qualified to be a Candidate for admission as a Fellow of this College, unless he shall have regularly taken the degree of Doctor of Law in one of the Universities of Oxford or Cambridge, and also been duly admitted an Advocate of the Court of Arches; and that such Candidate shall not be admitted a Fellow of the said College hereby incorporated, unless a majority of the whole College are present, and a majority of those present concur in the election: WE WILL also, that, in the absence of the Dean of the Arches from any meeting, the Doctor who is the next in the ordinary course of precedence, which has been heretofore usually observed in the Society, shall act as Vice-President at that meeting: MOREOVER we will, that, when any Doctor shall be admitted into the said College, his name shall be registered in a Register Book to be kept for that purpose, and that he shall remain a Fellow as long as he shall continue to be rated to the commons and other annual dues of the said College: AND WE do farther, for us, our heirs and successors, hereby give and grant unto the said President and Fellows, and their successors for ever, full power and authority, from time to time, to make, constitute, ordain and establish such and so many reasonable By-Laws, Rules, Orders, Ordinances and Constitutions, as they, or the greater part of them, being there present, shall judge proper and necessary for the regulation and management of the possessions and revenues of the said College, and the same, from time to time, as they may see occasion, to vary, alter or revoke, and to make such new Orders and Regulations in their stead, as they shall to the best of their judgments and discretions think most proper and expedient, so as the same be

just, honest and reasonable, and no way repugnant or contrary to the laws of this our realm: And our royal will and pleasure is, that a majority of the Members of the College shall be present at any meeting when business is to be transacted, and that a majority of those present must concur in any act which shall be binding upon the College: Provided always, that nothing herein contained shall extend or be construed to extend to affect any rights of the Archbishop of Canterbury, or his Officers, or of the Judges of the several Courts, or any privileges heretofore enjoyed by the Society: And farther, we do hereby give and grant to the President and Fellows of the College of Doctors of Law, exercent in the Ecclesiastical and Admiralty Courts, and their successors, that they shall and may, from time to time, nominate and appoint so many and such persons as they shall think proper to be Treasurers, Secretaries, Clerks and Officers of the said College, for the carrying on and transacting their necessary affairs: Provided also, that, if any abuses or differences shall, at any time hereafter, arise and happen concerning the government or affairs of the said College, whereby the constitution, progress, improvement and business thereof may be suffered or be hindered, in such case, we do hereby, for us, our heirs and successors, assign, constitute, authorize and appoint the Most Reverend the Lord Archbishop of Canterbury, the Lord Chancellor or Lord Keeper of our Great Seal of Great Britain, the Lord Keeper of our Privy Seal, and our two principal Secretaries of State for the time being, to be Visitors of the said College, with full power and authority to them, or any three or more of them, from time to time, to compose and redress any such differences or abuses; and, lastly, we do by these presents, for us, our heirs and successors, grant unto the said Corporation hereby established, and their successors, that these our Letters Patent, or the inrolment or exemplification thereof, shall be in and by all things good, firm, valid, sufficient and effectual in the law, according to the true intent and meaning thereof; and shall be taken, construed and adjudged in the most favourable and beneficial sense for the best advantage of the said Corporation, as well in all our Courts of Record as elsewhere, by all and singular Judges, Justices, Officers, Ministers and Subjects whatsoever of us, our heirs and successors,

any nonrecital, misrecital, or any other omission, imperfection, defect, matter, cause or thing whatsoever to the contrary thereof in anywise notwithstanding. IN WITNESS whereof, we have caused these our Letters to be made Patent. WITNESS ourself at Westminster, the Twenty-second day of June, in the Eighth year of our Reign.

By Writ of Privy Seal.

COCKS.

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